No. 83-128

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment requires appointment of counsel for an indigent prison inmate under criminal investigation during the time he is being held in administrative detention following the alleged offense but before the institution of adversary judicial proceedings.

2. Whether, in the absence of a specific showing of prejudice, dismissal of the indictment is the appropriate remedy for failure to appoint counsel once an indigent prison inmate is held in administrative detention more than 90 days because of a pending criminal investigation.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Robert Ramirez, Philip Segura, Adolpho Reynoso, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued — Page

Constitution, statutes and regulations:

Miscellaneous:

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. A, *infra*, 1a-29a) is reported at 704 F.2d 1116. An earlier opinion of the court of appeals in the case of respondents Mills and Pierce (App. B, *infra*, 30a-40a) is reported at 641 F.2d 875. An earlier opinion of the district court in the case of respondents Mills and Pierce (App. C, *infra*, 41a-50a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 26, 1983. On June 17, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

STATEMENT

This case raises the question whether the Sixth Amendment requires that counsel be appointed for an indigent prison inmate under criminal investigation during the time he is held in administrative detention following the alleged offense, but before the institution of adversary judicial proceedings. The court of appeals consolidated appeals from two separate sets of district court convictions involving prison inmate murders, both of which raised this issue.

1. Respondents Gouveia, Ramirez, Segura and Reynoso

Following a jury retrial in the United States District Court for the Central District of California, the four respondents were convicted of murder and conspiracy to commit murder, in violation of 18 U.S.C. 1111 and 1117 respectively. Each was sentenced to consecutive terms of imprisonment for life and 99 years. App. A, *infra*, 3a.

a. On November 11, 1978, inmate Thomas Trejo was stabbed to death at the Federal Correctional Institution at Lompoc, California. An autopsy revealed that Trejo had suffered 45 stab wounds, most of which were in the area of his heart (Tr. 149).[1]

Following the murder, the Federal Bureau of Investigation and prison officials began independent investigations to determine the identity of the murderers. Respondents Gouveia and Reynoso and inmate Pedro Flores were immediately placed in the Administrative Detention Unit ("ADU") at Lompoc (C.R. No. 40, Reynoso Declaration

[1] "Tr." signifies the transcript in the case of the *Gouveia* respondents.

at 1; C.R. No. 62 at 15).[2] While in ADU, the two respondents were separated from the remainder of the prison population, and their participation in various prison programs was curtailed. However, they were not deprived of regular visitation rights, exercise periods, access to legal materials, and telephones from which they could make unmonitored calls to attorneys. See App. A, *infra*, 3a, 6a; 28 C.F.R. 540.50(c), 540.101, 540.102, 540.105, 541.19, 541.20, 543.11(j), 543.13; C.R. No. 62 at 21; Tr. 2411.

On November 22, 1978, Gouveia, Reynoso, and Flores were removed from ADU and returned to the general prison population (C.R. No. 40, Reynoso Declaration at 1; C.R. No. 62 at 15). However, on December 4, 1978, all four respondents, as well as Flores and inmate Steven Kinard, were placed in ADU pending further investigation after prison officials obtained further information that implicated the six in the murder (see C.R. No. 40, Reynoso Declaration at 1; C.R. No. 33, Exh. C; C.R. No. 42 at 19; C.R. No. 62 at 15). Later in December, prison authorities conducted disciplinary hearings. Respondents requested appointment of counsel at the hearings, but the requests were denied (*e.g.*, C.R. No. 40, Reynoso Declaration at 1-2; C.R. No. 42 at 19; C.R. No. 60 at 2-3). Prison officials determined that the four respondents each had participated in the murder of Trejo and ordered that they be returned to ADU (App. A, *infra*, 2a).[3] There-

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[2] "C.R." signifies the district court Clerk's Record in the case of the *Gouveia* respondents. The number following the abbreviation corresponds with the entry number on the district court docket sheet.

[3] The reasons for the decision to return respondents to ADU are not set forth clearly in the record. However, a prison form dated December 1978, submitted as an exhibit to co-defendant Flores' motion to dismiss, indicates that he was placed in ADU pending investigation for violations of prison rules and crimes committed in the prison and because his "[c]ontinued presence * * * in general population pose[d] a serious threat" to other inmates and to the security of the institution (C.R. No. 33, Exh. C). Respondents

after, prison authorities directed that Gouveia and Ramirez be transferred to the control unit of the United States Penitentiary in Marion, Illinois, based on a finding that they were too dangerous to be maintained in the general prison population at Lompoc (C.R. No. 43 at 5; C.R. No. 60 at 4).

In March 1979, after the FBI notified the United States Attorney of the results of its investigation, the matter was presented to a grand jury, which, on June 17, 1980, indicted respondents, Flores, and Kinard for murder and conspiracy to commit murder. In addition, Reynoso, Kinard, and Flores were charged with conveyance of a weapon in a penal institution, in violation of 18 U.S.C. 1792. On July 14, 1980, respondents were arraigned in federal court, at which time they were appointed counsel (App. A, *infra*, 3a).

b. Prior to trial, respondents and Flores moved to dismiss the indictment on the ground that the 19-month period between their removal to ADU and their indictment violated the Sixth Amendment right to a speedy trial or, alternatively, constituted unreasonable preindictment delay in violation of the Due Process Clause of the Fifth Amendment. They also argued that the failure of prison authorities to appoint counsel to represent them during the period they were in administrative detention, coupled with their own inability to begin preparation of a defense because of their segregation from the general inmate population, violated their Sixth Amendment right to effective assistance of counsel.

Respondents made various factual representations to support their claims. For example, Gouveia acknowledged that he had obtained some information from the transcript of an FBI interview, and his counsel stated that he had learned from inmate rosters furnished by the

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apparently were returned to ADU for similar reasons (see C.R. No. 60 at 1-2); Gouveia and Ramirez presumably were returned to ADU for the additional reason that they were pending transfer to another penal institution. See 28 C.F.R. 541.20(a).

Bureau of Prisons the whereabouts of four potential defense witnesses; however, Gouveia's counsel asserted that he was unable to obtain information about two other potential witnesses (C.R. No. 60 at 5; C.R. No. 69 at 3-7). Ramirez claimed that because of his segregation from the general prison population he had been unable to contact potential witnesses who could verify his whereabouts on the day of Trejo's death; that he knew several of these inmates only by nicknames and thus was unable to establish their identities or determine their whereabouts; and that a potential witness had died since the murder (C.R. No. 43 at 5-6). Following argument, the district court denied respondents' motions to dismiss without opinion (C.R. No. 72).

c. Trial began on September 16, 1980. The jury acquitted Flores on all counts and acquitted Reynoso on the weapon conveyance count. However, the jury was unable to reach a verdict on the murder and conspiracy charges against respondents, and a mistrial was declared on those counts.

Retrial began on February 17, 1981. Kinard, who was the government's principal witness,[4] testified about the plans to murder Trejo. According to Kinard's testimony, Reynoso had told Kinard in early November 1978 that Trejo "had to go" by Christmas because he had made a "bad move against la cliqua" while incarcerated at Terminal Island (Tr. 488-489); Ramirez had arranged for another inmate to make several knives with which the murder would be committed (Tr. 489-500); and on the morning of the murder Reynoso stated that "the fool had to be sent home today" (Tr. 512-513). Kinard described the four respondents' actions in preparing for the murder and disposing of the weapons and blood-stained clothing

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[4] Kinard entered a plea of guilty on the weapon conveyance count prior to the first trial, with the understanding that the government would seek dismissal of the remaining counts and that he would testify on the government's behalf (Tr. 508-509).

and related their later descriptions of the stabbing (Tr. 515-559).[5] The prosecution introduced evidence that Gouveia's fingerprints and palm print and Segura's palm print were discovered in the cell where the murder occurred (Tr. 327-328, 443-444).

Respondents called 34 witnesses, including 14 alibi witnesses, to testify on their behalf (see App. A, *infra*, 28a). Each respondent sought to establish that he was elsewhere at the time of the murder. In addition, the respondents presented evidence that the crime had been committed by others, including Kinard. For example, five witnesses corroborated Segura's testimony that he was playing handball in the morning and that at the time the murder was committed he was playing pool and watching a football game on television (*e.g.*, Tr. 1568-1569, 1579-1590, 1596-1597, 1610-1612, 1764-1767, 2141-2148). Another witness verified Ramirez' testimony that he was lifting weights at the gymnasium at the time of the murder (Tr. 1939, 2245-2247). Three witnesses testified in support of Gouveia's story that on the morning of the murders he was eating in the dining hall and thereafter went to the gymnasium (Tr. 1549-1550, 1680-1681, 2114-2119, 2370-2378). Two witnesses testified that they were watching a football game with Reynoso at the time of the murders (Tr. 1418-1420, 1442, 1520-1525). In addition, the inmates identified by government witnesses as those who fabricated the knives and brought them into the prison denied any involvement in the scheme (Tr. 1795-1796, 2424). Other witnesses testified that Kinard had told them that he and another prisoner, who had since died, had murdered Trejo following a dispute over payment for drugs (Tr. 1855-1864, 1894-1897, 2064).

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[5] Several other prisoners corroborated portions of Kinard's testimony. For example, one inmate witness testified that Reynoso returned from the prison disciplinary hearing and stated that he had lost only about 20 days' good time and that, if that was all prison authorities were going to do, he would kill again (Tr. 1214-1215).

2. Respondents Mills and Pierce

Following a jury trial in the United States District Court for the Central District of California, respondents Mills and Pierce were convicted of murder, in violation of 18 U.S.C. (Supp. V) 1111, and of conveying a weapon in prison, in violation of 18 U.S.C. 1792. Pierce also was convicted of assaulting another prisoner, in violation of 18 U.S.C. 113(c). Each was sentenced to life imprisonment on the murder charge and to a concurrent three-year term on the weapon conveyance charge. App. A, *infra*, 4a-5a. Pierce received an additional concurrent three-year term on the assault charge (Mills Tr. 1783).

a. On August 22, 1979, Thomas Hall, an inmate at Lompoc, died after being stabbed 10 times in the "E" unit of the prison (Mills Tr. 445, 482-483). Shortly after the murder, Mills and Pierce were taken into custody and examined by an FBI agent and a prison doctor, who observed that Mills' face was flushed and that he had two puncture wounds on his left arm and a spot of blood on his thumbnail. Pierce's upper arm bore bruises that appeared to be finger impressions (Mills Tr. 461, 484, 619-621, 628). The following morning, Mills and Pierce were placed in ADU on the ground that they were pending investigation for criminal offenses and violation of prison regulations and that their continued presence in the general prison population "pose[d] a serious threat to life, property, self, staff, other inmates, or to the security of the institution" (App. B, *infra*, 33a-34a; Mills C.R. No. 59, Exhs. B, C). The conditions of their confinement in ADU were identical to those described above (see App. B, *infra*, 31a).

During disciplinary hearings conducted by the Bureau of Prisons several weeks later, respondents stated that they wished to consult with counsel, but the request was denied (App. B, *infra*, 31a; Mills C.R. No. 59 at 27-28). Mills declined the offer of assistance of a staff representative to interview witnesses and help prepare his case for the disciplinary proceeding (Mills C.R. No. 59, Mills Declaration at 28). See 28 C.F.R. 541.14(b). Prison

officials concluded that Mills and Pierce had murdered Hall and returned them to ADU. The two were ordered to forfeit their accumulated good time (App. A, *infra*, 4a). In addition, prison officials informed Mills that he would be transferred to the control unit at Marion Penitentiary (Mills C.R. No. 59 at 28).

On March 27, 1980, after Mills and Pierce had been in administrative detention for approximately seven months, they were indicted by a grand jury. At the time of their arraignment on April 21, 1980, respondents were appointed counsel. App. A, *infra*, 4a.

b. Mills and Pierce moved to dismiss the indictment on the grounds that their administrative detention for seven months prior to return of the indictment violated their Sixth Amendment right to a speedy trial or, alternatively, constituted unreasonable preindictment delay. They also contended that the failure of prison authorities to appoint counsel to represent them when they were placed in administrative detention violated their Sixth Amendment right to counsel.

In support of their claims of prejudice, Mills and Pierce alleged that lack of access to witnesses during the period in which they were confined in ADU "severely undermined" their ability to prepare a defense; that the time lapse following the murder prevented witnesses from recalling the details of the evening of August 22, 1979, "as clearly as they had * * * last fall," and that, in many cases, "defense witnesses are unable, * * * to remember who they were with [and] the times the crucial events took place" (Mills C.R. No. 59 at 16). Respondents also alleged that the release or transfer of some potential witnesses to other institutions had made it difficult to locate them, that it was impossible to find other potential witnesses who were known only by nicknames, that some witnesses were reluctant to testify, and that memories had faded (*id.* at 16-17; No. 49 at 7-8; No. 73 at 17-25). Finally, respondents

claimed that the time lapse made it impossible to analyze blood stains found on clothing; that evidence relating to the case had been lost or destroyed; and that their own physical wounds, which might have had some probative value for their defense, had healed (*id.* No. 49 at 9; No. 73 at 7-8).

On August 14, 1980, the district court granted the motion to dismiss the indictment (App. C, *infra*, 41a-50a). The court first concluded that respondents stood accused of the murder at the time they were committed to ADU and that, because the government failed to justify the ensuing 10-month delay in bringing them to trial, they were denied their Sixth Amendment right to a speedy trial. Alternatively, the court found that respondents were denied due process because their continued administrative detention after the government had substantially completed its investigation irreparably prejudiced their ability to prepare for trial. Finally, the court found that the government's failure to appoint counsel to represent respondents promptly after their placement in ADU deprived them of the Sixth Amendment right to counsel, as well as their due process right to prepare a defense. The court reasoned that respondents "were denied any effective opportunity to have an investigation conducted on their behalf while events were still recent and recollections intact" and that the passage of time "resulted in the irrevocable loss of exculpatory testimony and evidence * * *" (App. C, *infra*, 49a, 50a).

c. The court of appeals reversed (App. B, *infra*, 30a). It rejected the district court's holding that the 10-month delay between respondents' placement in ADU and the trial violated the Sixth Amendment Speedy Trial Clause, since administrative detention by prison authorities is not an "arrest" or "accusal" for speedy trial purposes (App. B, *infra*, 34a). The court of appeals held that the right to counsel did not attach until the initiation of formal adversary proceedings by way of indictment in

March 1980 (*ibid.*). Finally, the court of appeals noted respondents' claims of prejudice, but dismissed them as speculative (*id.* at 36a-37a).[6]

d. At trial, the government presented eyewitness testimony linking Mills and Pierce to the murder of Hall. The evidence showed that prior to the murder Mills told another inmate that he knew who was responsible for providing information that caused Mills to be placed temporarily in administrative detention and that Mills was going to "take care of it" upon his release from detention (Mills Tr. 344-345); in fact, it was Hall who had provided the information to prison authorities (*id.* at 474-476). The day before the murder Hall confronted Mills and demanded repayment of a debt (*id.* at 289). On the day of the murder there were several confrontations between Hall and Mills and Pierce (*id.* at 76-77, 291-292). After dinner, inmate Mellen, who was Hall's friend, heard Hall scream for help; he then saw Mills hold Hall from behind while Pierce stabbed Hall in the abdomen (*id.* at 88-96, 109). Other witnesses corroborated Mellen's testimony. For example, inmate Ehle testified that before the murder he had overheard Mills tell inmate John Able, identified as the leader of a prison gang known as the Aryan Brotherhood, that Mills was going to "move on" an inmate who owed him money; Mills asked Able whether the murder would make him eligible for membership in the Brotherhood (*id.* at 561-563). Ehle also testified that he overheard Mills discussing the murder with Able after it occurred (*id.* at 591-593). A substantial amount of physical evidence, including blood-stained clothing and wounds on the arms of both Mills

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[6] Judge Nelson issued a concurring opinion in which she stated that respondents' due process claims could properly be raised at trial (App. B, *infra*, 40a).

Following the court of appeals' reversal of the order dismissing the indictment, both respondents filed petitions for writs of certiorari, which were denied by this Court. 454 U.S. 902 (1981).

and Pierce, linked respondents to the murder (*id.* at 189-190, 418-425, 508-510, 618-621).

Mills and Pierce presented 42 witnesses, including six alibi witnesses. Three inmates testified that they were watching the entrance to the "E" unit during the period when the murder occurred but did not observe respondents enter or leave (Mills Tr. 682, 708-709, 728). Six witnesses corroborated Pierce's testimony (*id.* at 1401-1402) that he and Mills were eating a meal at the time of the crime and were locked in the dining hall with other prisoners immediately after its discovery (*id.* at 756-758, 777-779, 801-804, 819-824, 849-851, 1135-1137). Three inmates testified that they witnessed the crime and that, contrary to Mellen's testimony, the assailants were masked at all times, so that their identities could not be determined (*id.* at 985-992, 1028-1030, 1048-1050). Other witnesses testified that Hall was an informant and had many enemies in the prison population (*id.* at 1106-1109) and that bruises and cuts observed by investigators on the respondents' bodies shortly after the murders resulted from athletic injuries (*id.* at 1223-1225, 1325-1328). Several expert witnesses called by the defense challenged the accuracy of opinion testimony by government witnesses or testified based on the physical evidence that it was unlikely that respondents committed the murder (*e.g.*, *id.* at 902-903, 1278-1290, 1312-1318).

3. The Decision of the Court of Appeals

The en banc court of appeals consolidated the *Gouveia* and *Mills* cases. By a vote of six to five, it reversed the convictions and remanded for dismissal of the indictments. The majority held that when an inmate is separated from the general prison population for more than 90 days pending a criminal investigation, the Sixth Amendment requires that he be appointed counsel (App. A, *infra*, 17a).

The majority recognized that under this Court's decisions the right to counsel attaches only when formal

judicial proceedings are initiated. It reasoned, however, that "[t]he point of 'accusation' may be different for the prosecution of prison crimes, where the subject is already incarcerated and subject to the discretion and discipline of federal authorities" (App. A, *infra*, 7a). Proceeding from this premise, the majority concluded that, although separation of inmates from the general prison population properly serves disciplinary and security functions (*id.* at 10a), such detention becomes "accusatory" when one of the purposes is to isolate the prisoner pending investigation and trial (*id.* at 11a).

The majority acknowledged (App. A, *infra*, 11a) that administrative detention is necessary to further important governmental investigative interests, such as the protection of potential witnesses in the prison population. However, it observed that such detention deprives the prisoner of the opportunity to prepare a defense or even to keep track of the location of other inmate-witnesses in a transient prisoner population. This inability, the majority reasoned, "distinguishes [respondents] from suspects outside of prison who have not yet been arrested or indicted;" the position of such detainees "more resembles that of a suspect outside of prison who has been arrested and detained than that of an outside suspect who has been neither arrested nor detained" (*id.* at 12a). The majority noted that a suspect outside prison who is arrested and detained normally is arraigned without delay, at which time the right to counsel attaches; it concluded by analogy that "the administrative detention of an indigent inmate who is suspected of a crime does, under certain circumstances, give rise to the right to appointed counsel" (*id.* at 13a, 15a).

The majority then considered the circumstances under which administrative detention would trigger the right to counsel. Purporting to interpret applicable Bureau of Prisons regulations, the majority concluded that the maximum stay in segregation for purely disciplinary reasons is 90 days, and that any segregation for a period exceeding 90 days must be for investigative purposes. The

majority stated that "[i]f an inmate is held after the maximum disciplinary period has expired, he should be allowed to show that his detention, at least in part, is due to pending investigation or trial for a criminal act." If the inmate establishes indigency and requests counsel, "prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population" (App. A, *infra*, 17a). The majority concluded that prison authorities had violated the 90-day rule it had fashioned and that respondents thus had been denied the right to counsel.[7]

The majority then held that dismissal of the indictments was the appropriate remedy (App. A, *infra*, 20a-23a). It acknowledged (*id.* at 20a) that under *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981), the remedy for Sixth Amendment deprivations must be tailored to the injury suffered. It rejected the government's argument that none of the respondents had demonstrated actual and specific prejudice. The majority concluded that the belated appointment of counsel, coupled with respondents' prolonged administrative detention following the murders, handicapped the ability of respondents' attorneys to defend them at trial, citing the respondents' allegations of prejudice and the statements of the district court that had dismissed the indictments in the *Mills* case at the pretrial stage (App. A, *infra*, 20a-23a). The majority concluded that in any event it was appropriate to presume prejudice because ordinarily it would be difficult to prove or refute its existence (*id.* at 22a-23a).

Judge Wright dissented in an opinion joined by Judges Choy, Kennedy, Anderson, and Poole (App. A, *infra*, 24a-29a). The dissenters pointed out that the majority had confused right to counsel principles with speedy trial principles when it applied a de facto accusation concept.

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[7] The majority found it unnecessary to reach respondents' claims based on the Fifth and Eighth Amendments (App. A, *infra*, 5a).

They concluded that extension of the right to counsel to the preindictment investigative period contravenes decisions in which this Court has stated that the right to counsel attaches only at the time adversary judicial proceedings are initiated. The dissenters also noted that the majority's presumption of prejudice and dismissal of the indictment were inconsistent with *United States* v. *Morrison*, *supra*. The dissenters pointed out that the potential prejudice referred to by the majority resulted primarily from the passage of time, rather than ineffective assistance of counsel (App. A, *infra*, 28a), and that there are adequate remedies, short of dismissal of the indictment, for prejudice resulting from any governmental interference with access to witnesses (*id.* at 28a-29a). The dissenters concluded that the majority had departed substantially from Supreme Court precedent and that "review by that Court is indicated" (*id.* at 29a).[8]

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that the Sixth Amendment requires appointment of counsel for indigent inmates held in administrative detention pending criminal investigation represents a radical departure from this Court's decisions defining the right to counsel. Under those decisions, it is well established that the right to counsel attaches only at the initiation of adversary judicial proceedings. The court of appeals nevertheless concluded that in the prison setting the right to counsel arises wholly independent of the filing of any formal judicial charges against an inmate.[9]

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[8] On May 16, 1983, the court of appeals stayed the issuance of the mandate for a 90-day period commencing May 9, 1983.

[9] This case involves only the issue of the right to appointment of counsel for indigent inmates. The respondents were not denied the opportunity to retain their own counsel during the time they were in administrative detention (App. A, *infra*, 3a, 6a). Nor was there any claim that respondents' counsel rendered ineffective

In addition, the court of appeals' conclusion that dismissal of the indictment normally will be the appropriate remedy for the failure to appoint counsel at an early stage, despite the absence of any specific showing of substantial prejudice, conflicts with this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), which requires that the remedy for a violation of the right to counsel be tailored to the injury suffered. The court's virtually irrebuttable presumption that in such circumstances there will be irreparable prejudice to prison inmates, resulting in denial of a fair trial, is not well founded.

The court of appeals' "unprecedented expansion of the right to counsel" (App. A, *infra*, 24a) will have a significant effect on the administration of federal and state prisons and on the criminal justice system in the Ninth Circuit. The decision below threatens to interfere with important security measures taken by prison authorities in connection with prison crimes. In addition, the court's conclusion that dismissal of the indictment is the proper remedy means that not only these respondents, but also many other individuals who have committed serious institution crimes, will escape criminal penalties entirely. In view of the court of appeals' radical departure from the decisions of this Court and the significant impact of the decision below, review by this Court is warranted.

1. Each respondent was placed in the administrative detention unit at Lompoc after being identified as a suspect in a prison murder, and each remained there until after he was indicted. Bureau of Prisons regulations define administrative detention as "the status of confinement of an inmate in a special housing unit in a cell either by himself or with other inmates which serves to remove the inmate from the general population." 28

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assistance apart from the contention that failure to appoint counsel at an earlier stage impeded the ability to mount a fully effective defense.

C.F.R. 541.20. An administrative detainee normally is confined to his cell except for regular exercise, shower, and visitation periods, and he is deprived of the usual interaction with his fellow prisoners that is provided by shared meals, work and recreation. However, administrative detainees generally are afforded the same privileges as are made available to general population inmates (*e.g.*, commissary, visitation, and correspondence privileges). 28 C.F.R. 541.20(d).[10]

Bureau of Prisons regulations provide that inmates may be placed in administrative detention in a variety of circumstances. 28 C.F.R. 541.20(a). In particular, prison officials may place an inmate in administrative detention "when his continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate * * * [i]s pending investigation or trial for a criminal act." *Ibid.*[11] Separation of inmate-suspects from the general prison population during the course of a criminal investigation serves important security purposes, including protection of potential inmate-witnesses from intimidation and prevention of subornation of perjury.[12] The federal concerns under-

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[10] Bureau of Prisons regulations distinguish between "administrative detention" and "disciplinary segregation." Under the regulations, "[i]nmates housed in disciplinary segregation have significantly fewer privileges than those housed in administrative detention." 28 C.F.R. 541.19(a). The record appears to indicate that respondents were in administrative detention, as opposed to disciplinary segregation, during the entire period of their separation from the general prison population.

[11] Under the regulations, an inmate may also be placed in administrative detention if he is pending hearing or investigation in connection with a violation of prison regulations, is pending transfer to another institution, needs protection, or is terminating confinement in disciplinary segregation and placement in the general prison population is not prudent. 28 C.F.R. 541.20(a).

[12] For instance, there is evidence that members of the Aryan Brotherhood, to which respondent Mills sought admission (Mills

lying such detention are similar to state interests in detention of inmates pending investigation, recognized by this Court in *Hewitt* v. *Helms*, No. 81-638 (Feb. 22, 1983), slip op. 14-15: "[The state] must protect possible witnesses—whose confinement leaves them particularly vulnerable—from retribution by the suspected wrongdoer, and, in addition, has an interest in preventing attempts to persuade such witnesses not to testify at disciplinary hearings." See also *id.* at 16 n.9 (noting that pendency of a state criminal investigation was a factor properly taken into account in continuing administrative detention). These are the concerns that underlay the placement of respondents in administrative detention during the time the FBI and prosecutors conducted investigations of the murders.

2. The decisions of this Court make clear that the Sixth Amendment right to counsel attaches only at the initiation of adversary judicial proceedings:

> In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama*, 287 U.S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama*, *supra*; *Johnson* v. *Zerbst*, 304 U.S. 458; *Hamilton* v. *Alabama*, 368 U.S. 52; *Gideon* v. *Wainwright*, 372 U.S. 335; *White* v. *Maryland*, 373 U.S. 59; *Massiah* v. *United States*, 377 U.S. 201; *United States* v. *Wade*, 388 U.S. 218; *Gilbert* v. *California*, 388 U.S. 263; *Coleman* v. *Alabama*, 399 U.S. 1.

Kirby v. *Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion). Accord, *Estelle* v. *Smith*, 451 U.S. 454, 469-470

Tr. 562-563), have sworn to perjure themselves on behalf of fellow members who may be prosecuted. See *United States* v. *Abel*, 707 F.2d 1013, 1016 (9th Cir. 1983).

(1981); *Moore* v. *Illinois*, 434 U.S. 220, 226-227 (1977).[13] Of course, the Sixth Amendment by its terms refers to rights in connection with "criminal prosecutions." Moreover, practical considerations support the conclusion that the right to counsel does not attach until the commencement of adversary judicial proceedings:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. See *Powell* v. *Alabama*, 287 U.S. at 66-71; *Massiah* v. *United States*, 377 U.S. 201; *Spano* v. *New York*, 360 U.S. 315, 324 (Douglas, J., concurring).

Kirby v. *Illinois*, *supra*, 406 U.S. at 689-690 (footnote omitted). Accord, *Moore* v. *Illinois*, *supra*, 434 U.S. at 227, 228.

The court of appeals disregarded these well-established principles in concluding that respondents' right to appointed counsel attached 90 days after they had been placed in administrative detention following commission of a criminal offense—at which point the government was still conducting its investigation and had not yet determined whether prosecution was warranted.[14] The court

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[13] The initiation of adversary judicial proceedings may occur at the time of formal charge, preliminary hearing, indictment, information, or arraignment. See *Estelle* v. *Smith*, *supra*, 451 U.S. at 469-470; *Moore* v. *Illinois*, *supra*, 434 U.S. at 226-229; *Kirby* v. *Illinois*, *supra*, 406 U.S. at 689.

[14] The court of appeals acknowledged (App. A, *infra*, 10a) that there is no right to counsel in connection with prison disciplinary proceedings. See *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974).

of appeals attempted to avoid the apparent inconsistency between its holding and this Court's right to counsel cases by announcing that an inmate becomes an "accused" after 90 days of administrative detention (App. A, *infra*, 13a, 16a-17a). This analysis is plainly wrong. To begin with, even if continuation of administrative detention were equivalent to some sort of "accusation", it would not trigger the right to counsel, which attaches only at the initiation of adversary judicial proceedings. Moreover, assuming for the sake of argument that a speedy trial analysis could be applied to the right to counsel (see *id.* at 24a-25a), the court's reasoning would still be incorrect. It is not detention alone that triggers the right to a speedy trial under the Sixth Amendment; rather, both arrest *and* "holding to answer a criminal charge" are necessary to engage the speedy trial provision. *United States* v. *Marion*, 404 U.S. 307, 320 (1971). See also *id.* at 321 (referring to a defendant who "has been arrested and held to answer"); *United States* v. *MacDonald*, 456 U.S. 1, 7 (1982) ("no Sixth Amendment right to a speedy trial arises until charges are pending"); *id.* at 8-9 (speedy trial guarantee inapplicable once charges are dismissed). An inmate in administrative detention is not held to answer a criminal charge until such a charge is made, *e.g.*, at the time of indictment.[15]

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[15] The court of appeals acknowledged (App. A, *infra*, 14a) that, under its own case law and that of other circuits, segregation of an inmate from the general prison population does not constitute an "arrest" or "accusation" for speedy trial purposes. See *United States* v. *Clardy*, 540 F.2d 439, 441 (9th Cir.), cert. denied, 429 U.S. 963 (1976); *United States* v. *Blevins*, 593 F.2d 646 (5th Cir. 1979); *United States* v. *Duke*, 527 F.2d 386, 389-390 (5th Cir.), cert. denied, 426 U.S. 952 (1976). See also *United States* v. *Mills*, 704 F.2d 1553, 1556-1557 (11th Cir. 1983). It is thus especially ironic that it should attempt to justify its decision by reference to speedy trial criteria heretofore deemed irrelevant to the less elastic right to counsel.

It is simply incorrect to view administrative detention as in any way accusatory. It is prison officials, not prosecutors, who make the decision to place or retain an inmate in administrative detention. The purpose of such detention is not to accuse or to initiate judicial proceedings. Rather, separation of an inmate from the general prison population serves security purposes, including protection of other inmates, prison staff, and the institution as a whole. As the court of appeals itself recognized (App. A, *infra*, 10a), administrative detention "is perhaps the princip[al] remedy available to prison officials when crime or other disturbances threaten the prison environment." In particular, as we described above (pages 15-17), administrative detention pending a criminal investigation or trial serves significant security purposes, such as preventing suspects from intimidating or injuring potential witnesses. Detention for these purposes does not amount to an "accusation." [16]

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[16] Disciplinary segregation (as opposed to administrative detention, see note 10, *supra*) may be imposed as punishment following a prison disciplinary hearing. Such segregation does not constitute an "accusation" or initiation of a criminal prosecution to which Sixth Amendment rights attach any more than does administrative detention. In any event, as noted above (note 10), it does not appear that respondents were held in disciplinary segregation at any time; rather, they were in administrative detention.

We note that in developing its theory of when separation from the general prison population would become "accusatory," the court of appeals appears to have misread Bureau of Prisons regulations. The court concluded (App. A, *infra*, 17a) that the maximum period of segregation for disciplinary reasons would be 90 days. However, under 28 C.F.R. 541.11 the maximum period of disciplinary segregation following a disciplinary hearing is 60 days (assuming only one offense is involved), while under 28 C.F.R. 541.20(a) an inmate may be held in post-disciplinary detention for up to 90 days. Thus, contrary to the court of appeals' calculation, an inmate could spend a total of 150 days away from the general prison population after disciplinary segregation had been imposed (or perhaps more if more than one offense is involved). No such specific time limits are imposed in connection with administrative detention, although prison staff conduct periodic reviews

The court of appeals concluded (App. A, *infra*, 11a-12a) that a right to counsel at the preindictment stage would be appropriate because it is difficult for an inmate in administrative detention to conduct an investigation and prepare a defense to criminal charges that might eventually be filed against him. But this Court has never suggested that a constitutional right to counsel attaches prior to indictment whenever a potential defendant lacks investigative resources.[17] Indeed, if this were the case, the government would be required to provide counsel for many suspects, both inside and outside prisons.[18]

In any event, the court of appeals' concerns about the ability of respondents to investigate and prepare a defense are properly addressed under due process standards, not under a Sixth Amendment right to counsel analysis. The sort of prejudice alleged by respondents—faded memories and inability to locate witnesses or examine physical evidence—is quite similar to that alleged in *United States* v. *Marion*, 404 U.S. 307 (1971), and *United States* v.

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to determine whether continued detention is appropriate. 28 C.F.R. 541.20.

[17] Cf. *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940) (noting that the Constitution "nowhere specifies any period which must intervene between the required appointment of counsel and trial"); *United States* v. *Ash*, 413 U.S. 300 (1973) (right to counsel applies to trial-like confrontations, not to prosecutor's investigations or interviews with witnesses).

[18] As the dissenters noted (App. A, *infra*, 26a), obstacles similar to those respondents faced may confront an individual who is convicted and imprisoned for one crime while investigation for other offenses is underway or an individual whose probation or parole is revoked for renewed criminal activity. Moreover,

> [e]ven free suspects often lack the investigatory advantages the majority attributes to them. Many law enforcement investigations are confidential and continue for months or years. Like [respondents], the targets in such cases have limited knowledge or none about the investigations.

Ibid.

Lovasco, 431 U.S. 783 (1977), in which the Court concluded that allegations of prejudice resulting from pre-indictment delay are properly addressed under a due process standard, rather than a Sixth Amendment speedy trial analysis. If respondents have any constitutional claim that they were deprived of a fair trial as a result of their administrative detention, that claim should be evaluated under due process criteria, rather than under a right to counsel analysis that is so clearly inconsistent with this Court's decisions.

3. The court of appeals also erred in concluding that dismissal of the indictments was the appropriate remedy in the absence of any specific showing of prejudice resulting from the failure to appoint counsel during respondents' stay in administrative detention. Dismissal of the indictment is a drastic remedy that is rarely appropriate, even in the case of constitutional violations. See, *e.g.*, *United States* v. *Blue*, 384 U.S. 251, 255 (1966). This Court stressed in *United States* v. *Morrison*, *supra*, 449 U.S. at 364-365 (footnote omitted), that "remedies should be tailored to the injury suffered" and that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of the right to counsel] may have been deliberate." The Court pointed out in *Morrison* that in right to counsel cases the proper approach is to identify and neutralize any taint "by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365.

Here the court of appeals made little effort to determine whether respondents had suffered actual and significant prejudice as a result of the failure to appoint counsel during the period of administrative detention. To the extent the court attempted to identify prejudice, it relied on respondents' allegations and on the pretrial conclusions of the district court that had dismissed the indictment in the *Mills* case—conclusions that a panel of the court of appeals subsequently had found to be with-

out foundation (see App. B, *infra*, 30a-40a). The court of appeals made no attempt to analyze whether these predictions of prejudice had been borne out by events at trial. In fact, the court concluded that in the case of inmate-suspects who are held in administrative detention during the preindictment period it is proper to "presume prejudice because ordinarily it will be impossible adequately either to prove or refute its existence" (App. A, *infra*, 22a). The court of appeals suggested that its holding was in line with *Morrison* because, in the court's view, the "potential for substantial prejudice" resulting from the failure to appoint counsel during administrative detention could not be cured by an after the fact remedy (App. A, *infra*, 21a, 22a). But *Morrison* surely requires more than the potential for prejudice as a prerequisite to dismissal of the indictment.

This Court has made clear that courts must make case by case evaluations to determine whether constitutional violations have resulted in actual prejudice and whether such prejudice is so great that dismissal of the indictment is warranted, even when this is not an easy task. In *United States* v. *Marion*, *supra*, 404 U.S. at 325-326, the Court stressed that the possibility of prejudice in the form of dimmed memories, inaccessible witnesses, and lost evidence resulting from preindictment delay is not alone sufficient to establish that a defendant will be deprived of a fair trial and to justify the drastic remedy of barring the prosecution. See also *United States* v. *Lovasco*, *supra*, 431 U.S. at 796-797. This requirement of a concrete showing of prejudice applies even where the prosecutor has deliberately and unfairly delayed indictment in an effort to secure a tactical advantage at trial. *Id.* at 790.[19] Respondents' allegations of prejudice are

[19] More recently, in *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), the Court required some showing of prejudice even in a case in which (unlike this case) the government had acted to remove from the reach of process individuals it knew to be percipient witnesses. The Court held that, under either the

quite similar to the kind that courts regularly evaluate in passing upon claims of improper preindictment delay, and we find it impossible to understand why the court of appeals deemed it necessary to dispense with such an inquiry in this context.

We also take issue with the court of appeals' conclusion (App. A, *infra*, 22a) that the circumstances of prison cases normally make it impossible to determine whether prejudice has resulted from the failure to appoint counsel during administrative detention. In fact, in view of the controlled conditions of prison life (resulting in a limited number of potential witnesses and availability of inmate rosters, photographs, and other records), it should usually be less difficult than in other cases to determine whether preparation of an inmate's defense has been impaired. Moreover, at least in federal prison cases, a court should consider the fact that those wrongly suspected of crime are not without recourse. The Bureau of Prisons provides staff representatives to help inmates investigate and present evidence in connection with prison disciplinary hearings. Under 28 C.F.R. 541.15, the staff representative "shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the [institution discipline committee] on the merits of the charge(s) or in extenuation or mitigation of the charge(s)." Thus, inmates normally will have had access to the sort of assistance with which the

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Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment, a defendant cannot establish that the government's deportation of witnesses has resulted in deprivation of a fair trial "unless there is some explanation of how their testimony would have been favorable and material" (slip op. 14). The Court stressed in *Valenzuela-Bernal* that determinations of the materiality of a missing witness's testimony often would be best made in light of all the evidence adduced at trial (*id.* at 15). See also *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) (noting that a claim of prejudice from violation of the right to a speedy trial is "best considered only after the relevant facts have been developed at trial").

court of appeals was concerned.[20] Moreover, as in any case, the absence of some potential witnesses may or may not make a difference, depending on the defense theory and on the ability to locate other witnesses, as well as on the strength of the prosecution's case. If the testimony of allegedly missing witnesses would have been cumulative to that of witnesses who have been located, the absence of the former does not warrant the drastic remedy of barring prosecution altogether.[21] Finally, in evaluating prejudice in cases like this one, a court should take into account the fact that the prosecution also faces significant investigative hurdles in the case of prison crime (see App. A, *infra*, 11a), including difficulty in obtaining cooperation from inmate-witnesses and a shortage of witnesses whom a jury is likely to find credible. Moreover, every defendant has the ultimate protection of the prosecution's burden of proving guilt beyond a reasonable doubt.

Here, no substantial basis exists for concluding that the failure to appoint counsel during administrative detention deprived respondents of a fair trial. Respondents' appointed counsel conducted extensive investigation and presented "defenses of uncommon quality and vigor" (App. A, *infra*, 28a). At trial, the *Gouveia* respondents presented 34 witnesses, including 14 alibi witnesses, while the *Mills* respondents presented 42 witnesses, including

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[20] The record in this case indicates (Mills C.R. No. 59, Mills Declaration at 28) that respondent Mills refused the offer of assistance of a staff representative; it is unclear whether the other respondents took advantage of such assistance.

[21] Other factors also might indicate that a defendant has not been deprived of a fair trial as a result of the failure to appoint counsel during administrative detention. The most obvious would be acquittal; here, the *Gouveia* respondents' co-defendant Flores was acquitted, although he had been in administrative detention or at another institution during most of the preindictment period and made claims of prejudice similar to those made by respondents (see pages 2-3, 5, *supra*; C.R. No. 33 at 15, 16, 18-19).

six alibi witnesses. See pages 6, 11, *supra*. Although the *Mills* respondents complained that they were prejudiced by deterioration of physical evidence, they presented several expert witnesses who testified concerning that evidence. See page 11, *supra*. Several of the *Gouveia* respondents were not placed in administrative detention until approximately three weeks after the murder occurred; thus, they had some opportunity to investigate and prepare defenses during the weeks immediately following the offense—presumably the most important time for purposes of investigation.[22] In such circumstances, the court of appeals should have analyzed the respondents' allegations of prejudice in light of the evidence presented at trial, rather than simply presuming that there would be prejudice in virtually every case involving the failure to appoint counsel during administrative detention.[23]

4. The decision below will have significant practical consequences for the administration of federal and state prisons and for the criminal justice process in the Ninth Circuit. Under the decision, after an indigent inmate has been in administrative detention for 90 days following commission of a criminal offense, prison officials must choose between providing counsel for the inmate and returning him to the general prison population. As a practical matter, appointment of counsel would require prison officials and the court to set up new administrative pro-

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[22] Respondents Ramirez and Segura were not placed in administrative detention until December 4, 1978—three weeks after the murder of Trejo; respondents Gouveia and Reynoso were released from detention and returned to the general prison population in the period between November 22 and December 4, 1978. See pages 2-3, *supra*. The record contains no evidence that the respondents took advantage of these periods to conduct investigations.

[23] In addition, as the dissenters pointed out below (App. A, *infra*, 28a-29a), there are remedies short of dismissal of the indictment (including cross-examination, argument to the jury, and instructions concerning missing evidence) that can mitigate prejudice in cases like this one.

cedures.[24] In addition, prison officials would have to make arrangements to ensure that preindictment investigation of the type envisioned by the court of appeals could be conducted consistently with the maintenance of order in the institution and with the need to avoid interference with ongoing FBI investigations.

The alternative of releasing inmate-suspects into the general prison population after 90 days of administrative detention would be unacceptable in many instances. As noted above, prison officials have responsibilities to preserve order and to protect the integrity of ongoing investigations. These responsibilities normally will require continued administrative detention of inmates pending investigation of serious crimes. While there may occasionally be useful investigation that an inmate could conduct to vindicate his innocence, prison officials would be derelict in their duties if they failed to take into account the fact that often such "investigations" are likely to consist of intimidating prospective witnesses and suborning perjury. See, *e.g.*, *United States* v. *Castillo*, 615 F.2d 878, 885 (9th Cir. 1980).

The decision below is of particular concern if it is read to prohibit transfer of an inmate-suspect to a higher security institution following commission of a criminal offense.[25] Transfer is an important administra-

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[24] The court of appeals spoke in terms of prison officials appointing counsel for indigent inmates (App. A, *infra*, 17a). In fact, however, the Bureau of Prisons itself has neither statutory authority nor a source of funding with which to appoint counsel. However, if the court of appeals' recognition of a Sixth Amendment right to counsel in this context is correct, it appears that district courts could appoint counsel pursuant to the Criminal Justice Act of 1964, 18 U.S.C. 3006A(a), on the motion of an inmate or the Bureau of Prisons. Here respondents did not apply to a district court for appointment of counsel.

[25] Transfer of an inmate to another institution presumably would interfere with his ability to investigate and prepare a defense even more than would a continuation of administrative detention. Indeed, even if counsel were appointed, it is unclear whether the

tive tool for prison officials who are responsible for inmates who cannot safely be returned to the general population. See, *e.g.*, *Olim* v. *Wakinekona*, No. 81-1581 (Apr. 26, 1983); *Howe* v. *Smith*, 452 U.S. 473 (1981); *Meachum* v. *Fano*, 427 U.S. 215 (1976); *Montanye* v. *Haymes*, 427 U.S. 236 (1976). The Bureau of Prisons has informed us that during a recent 12-month period approximately 400 inmates in detention following suspected commission of an indictable offense were transferred before being returned to the general prison population. Of the 400, over 70 were transferred from prisons located within the Ninth Circuit. If as a result of the decision below prison authorities may not transfer inmates found to have participated in a prison murder, there would be a significant threat to the security of federal prisons.

Moreover, it is not at all clear that appointment of counsel during administrative detention would contribute as significantly to an inmate's investigation or preparation of a defense as the court of appeals presumed. Bureau of Prisons officials have informed us that they are unaware of any instances in which retained counsel have sought access to a prison to conduct an investigation prior to indictment. Of course, security concerns would make it virtually impossible to allow counsel unsupervised access to the premises of a prison or free rein to seek out possible witnesses from among the inmates. Moreover, inmates may obtain the assistance of a staff representative in connection with disciplinary proceedings. See pages 24-25, *supra*. Thus, an inmate who is sincerely interested in exonerating himself already has access to an individual who is responsible for investigation, interview-

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court of appeals' decision would permit a transfer (*e.g.*, from California to the Marion Penitentiary in Illinois), since the result could be either that the inmate and his counsel would be too far apart to confer conveniently (if counsel were located in California), or that both would be located a considerable distance from the scene of the crime (if counsel were located in Illinois).

ing witnesses, and presenting a defense on behalf of the inmate. See 28 C.F.R. 541.15(b).

There are also significant practical concerns arising from the court of appeals' conclusion, without analysis of actual prejudice or alternative remedies, that the appropriate remedy in cases like this one is dismissal of the indictment. The two brutal murders in this case are typical of the violent prison crimes that have become a serious threat to the security of both federal and state institutions in recent years. See, *e.g.*, App. B, *infra*, 31a (noting information that Lompoc inmates committed at least 14 homicides in 1980); *Brothers in Blood: Prison Gangs Formed by Racial Groups Pose Big Problem in West*, Wall St. J., May 11, 1983, § 1, at 1, col. 1.

If the decision below stands, the result will be that many especially dangerous individuals who have committed serious institution crimes will escape criminal penalties entirely. On a nationwide basis, the Bureau of Prisons has identified over 200 pending prosecutions for serious institution crimes (including 66 in the Ninth Circuit). The Bureau believes that many of the defendants in these prosecutions were held in disciplinary segregation and/or administrative detention for more than 90 days following the offense and prior to indictment; thus, indictments against them would apparently have to be dismissed if the decision below is correct. And, of course, the Ninth Circuit's novel rule casts a pall over the viability of innumerable state prosecutions for prison crimes. In view of these consequences, and in light of the practical problems federal and state prison officials will face as a result of the decision below, it would be unduly burdensome if resolution of the questions raised by the decision below were postponed. Thus, review of the decision below is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 81-1271, 81-1272, 81-1273,
81-1274, 82-1206, 82-1278

DC Nos. CR 80-535-3-MML, CR 80-535-2-MML,
CR 80-535-5-MML, CR 80-535-1-MML,
CR 80-278-1-WPG, CR 80-278-2-WPG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM GOUVEIA, ROBERT RAMIREZ, PHILIP SEGURA,
ADOLPHO REYNOSO, ROBERT EUGENE MILLS,
RICHARD RAYMOND PIERCE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
William P. Gray, District Judge, Presiding
Argued and Submitted December 15, 1982

Before: BROWNING, Chief Judge, WRIGHT, CHOY, SNEED, KENNEDY, ANDERSON, HUG, SCHROEDER, POOLE, FERGUSON, and NELSON, Circuit Judges

SNEED, Circuit Judge:

[Filed Apr. 26, 1983]

Appellants Reynoso, Segura, Ramirez, and Gouveia have been convicted of murdering a fellow inmate at the Federal Correctional Institution in Lompoc, California (FCI-Lompoc). Appellants Mills and Pierce, also inmates at FCI-Lompoc, were convicted of a later murder at the same institution. Each appellant was isolated in administrative detention without the benefit of counsel for an extended period prior to being indicted. We consolidated these cases for en banc consideration of whether, under any circumstances, a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment.

I.

FACTS

A. *Appellants Reynoso, Segura, Ramirez, and Gouveia*

Thomas Trejo, an inmate at FCI-Lompoc, was stabbed to death on November 11, 1978. The Bureau of Prisons instituted an administrative investigation and on December 4, 1978, the Unit Disciplinary Committee and the Institutional Disciplinary Committee at FCI-Lompoc conducted administrative hearings to consider appellants' involvement in the killing. Appellants Ramirez and Reynoso requested appointment of counsel at the hearings, but their requests were denied. Prison officials found that appellants had killed Trejo and appellants were placed in isolation in the administrative detention unit (ADU) at FCI-Lompoc.

Appellants remained in ADU continuously until July of 1980, a period of more than 19 months.

While in ADU appellants were confined in individual cells except for short daily exercise periods; they were denied access to the general prison population and their participation in various prison programs was curtailed. Appellants did have access to legal materials, they had visitation rights, and they could make unmonitored phone calls. During this period appellants were not appointed counsel though their opportunity to hire private counsel was not restricted.

The Federal Bureau of Investigation conducted its own investigation into Trejo's murder, concurrent with the Bureau of Prison's internal investigation. In January 1979, the United States Attorney's Office was officially informed of the FBI investigation and a prosecutive file was opened. In March 1979, a grand jury investigation commenced. Appellants Reynoso, Ramirez, and Segura appeared before the grand jury to provide fingerprint examplars and they were appointed counsel for purposes of that appearance.

On June 17, 1980, the grand jury indicted appellants on charges of first degree murder and conspiracy to commit murder in violation of 18 U.S.C. §§ 1111, 1117. On July 14, 1980, appellants were arraigned in federal court and the magistrate appointed counsel. Appellants' first trial commenced on September 16, 1980, but it resulted in a mistrial when the jury was unable to reach a verdict. A second trial began on February 17, 1981, and all four appellants were convicted on both counts. They were each sentenced to consecutive life and ninety-nine year terms of imprisonment.

B. *Appellants Mills and Pierce*

Thomas Hall, an inmate at FCI-Lompoc, was stabbed to death on August 22, 1979. Appellants

Mills and Pierce were questioned and given physical examinations by FBI agents and prison officials. They were placed in ADU on the day following the murder. An internal prison investigation culminated in a hearing before the Institutional Disciplinary Committee on September 13, 1979. Appellants were adjudged guilty of killing inmate Hall and, in accordance with prison regulations, were ordered to forfeit all accumulated "good time."

Mills and Pierce remained isolated in ADU for eight months. They were not permitted to communicate with inmates in the general population or other potential witnesses, to discuss their case with anyone other than prison officials, or to be examined by their own physicians or experts. During this time appellants repeatedly asked to speak with counsel but their requests were denied. On March 27, 1980, Mills and Pierce were indicted under 18 U.S.C. §§ 1111, 1792, for first degree murder of a federal inmate and for conveyance of a weapon in prison. Pierce was indicted also for assault under 18 U.S.C. § 113(c). On April 21, 1980, appellants were arraigned, appointed counsel, and released from ADU.

The district court dismissed the indictments on the grounds that appellants had been denied their constitutional rights to speedy trial and assistance of counsel. It concluded that the government failed to justify its delay in seeking the indictments or in bringing defendants to trial, or to explain why Mills and Pierce remained in isolation for eight months without assistance of counsel. It found that they had been irreparably prejudiced because of the dimming of memories of exonerating witnesses, the loss of witnesses, and the deterioration of physical evidence.

On appeal this court reversed the dismissal, holding that the Sixth Amendment right to counsel and a

speedy trial did not attach until appellants were indicted. *United States v. Mills*, 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981). We further held that the preindictment delay did not deny appellants due process because appellants could not demonstrate actual prejudice resulting from the delay. In January 1982, appellants were brought to trial, convicted on all counts, and sentenced to life imprisonment. On appellants' petition, we consolidated appellants' post-conviction appeal with *United States v. Gouveia* for reconsideration by the court sitting en banc of whether appellants were denied their constitutional right to counsel during the preindictment period in which they were isolated in ADU.

II.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

Appellants claim, *inter alia*, that lengthy preindictment isolation without assistance of counsel irrevocably prejudiced their ability to prepare an effective defense, and thus unconstitutionally deprived them of their right to counsel and to a fair trial in contravention of the Fifth, Sixth, and Eighth Amendments. Because we conclude that appellants were denied their Sixth Amendment right to counsel, we do not reach the Fifth and Eighth Amendment claims.

The Sixth Amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . to have the Assistance of Counsel for his defence." This guarantee is meant to assure fairness in the adversary criminal process. *United States v. Morrison*, 449 U.S. 361, 364 (1981). The right to counsel is primarily a trial right. It has been held to

attach at any point in the prosecution where an attorney is necessary to preserve the accused's right to a fair trial or to ensure that the accused will receive effective assistance of counsel at the trial itself. *See id.* at 364; *United States v. Wade*, 388 U.S. 218, 225-27 (1967).

There is no dispute that Sixth Amendment guarantees are as applicable to the prosecution of prison crimes as to any other criminal prosecution. *See, e.g., United States v. Clardy*, 540 F.2d 439 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979). Thus appellants were appointed counsel in their arraignments. *See Powell v. Alabama*, 287 U.S. 45 (1932). The issue before us is a narrower one though; it is a question of first impression that is unique to prison crime. We must decide whether the isolation of appellants in administrative detention pending investigation and trial obligated prison officials to provide counsel at any time prior to appellants' indictments.

Each appellant has established that while being held in administrative detention he lacked the means necessary to hire an attorney. This is significant because inmates held in administrative detention are not denied access to counsel. Though isolated from the general prison population, they have the opportunity to make unmonitored phone calls if they wish to talk to an attorney and they have visitation rights. 28 C.F.R. §§ 541.19(c)(10), 541.20(d) (1982). Thus, it is only indigent inmates, those who are without the means to retain counsel on their own, whose constitutional right to the assistance of counsel is before us today.

The government first argues that the appointment of counsel at arraignment fully satisfied appellants'

constitutional rights to assistance of counsel. This position is based on *Kirby v. Illinois*, 406 U.S. 682 (1972), where the Supreme Court held that the Sixth Amendment right to counsel attaches when formal judicial proceedings are initiated by way of indictment, information, arraignment, or preliminary hearing. *See also United States v. Bagley*, 641 F.2d 1235 (9th Cir.), *cert. denied*, 454 U.S. 942 (1981); *United States v. Zazzara*, 626 F.2d 135 (9th Cir. 1980). The Court in *Kirby* reasoned that until adversary proceedings are initiated the suspect is not "accused" and no criminal prosecution is underway. Thus, by its own terms, the Sixth Amendment does not require that counsel be present at a preindictment identification proceeding. 406 U.S. at 689-90.

We, of course, are bound by the Supreme Court's decision in *Kirby*. However, *Kirby* is not a prison case. The point of "accusation" may be different for the prosecution of prison crimes, where the suspect is already incarcerated and subject to the discretion and discipline of federal authorities. The Supreme Court itself has recognized that the point of "accusation" for one purpose of the Sixth Amendment can vary from that of another. Thus, an arrest will trigger the Sixth Amendment right to a speedy trial even if no formal indictment has been brought. *United States v. Marion*, 404 U.S. 307, 320 (1971). That is because the arrest is a public act that seriously interferes with the suspect's liberty in a way that the speedy trial provision is designed to mitigate. *See id.* at 320.

No Supreme Court case limiting the right to an attorney to post-indictment proceedings confronts the unique situation of a prisoner held in administrative detention. *Kirby* and cases interpreting it are based

on the following assumption: "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice." 406 U.S. at 689. And so it is, at least when non-inmates are accused of crime. But appellants were detained in solitary confinement for up to twenty months while the government prepared to prosecute them. Thus, the assumption in *Kirby*—that the indictment is the tool by which the suspect first is brought face-to-face with government prosecutorial forces—is not present in this case in precisely the same manner. Prior to indictment appellants have confronted the prison disciplinary processes with the result that each was found to be a murderer for which each was subjected to prison discipline.

The Supreme Court's opinion in *Marion* provides a guide to follow in determining whether a particular governmental act constitutes a criminal accusation for the Sixth Amendment purposes. It shows that an accusation depends in part on whether the government's conduct in question has the particular consequences for a suspect that the Sixth Amendment guarantee is designed to prevent. Or, stated another way, whether a person stands accused can only be determined from the totality of circumstances. *See Escobedo v. Illinois*, 738 U.S. 478, 485-86 (1964). It is true that a person outside prison is usually not accused until an indictment has been issued. *But see United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) (holding that arrest warrant initiated state prosecution for *Kirby* purposes because New York law equates the issuance of an arrest warrant on probable cause with the filing of an indictment); *Common-*

wealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974) (same). But appellants were subject to the discretion of government officials in a way that individuals outside prison are not. To determine whether prison disciplinary proceedings which culminate in administrative detention can in any circumstances constitute a criminal accusation, it is necessary that we examine its function and its impact on detainees suspected of a crime.

We note at the beginning that administrative detention is a "substantial deprivation of liberty." *Wolff v. McDonnell*, 418 U.S. 539, 594 (1974) (Douglas, J., dissenting). As such, certain procedural guarantees—established both by judicial application of the Due Process Clause and by prison regulations—govern its use. *See Hewitt v. Helms*, 103 S. Ct. 864 (1983). Appellants do not challenge the legitimacy of administrative detention in general or its appropriateness in the instant case. Rather, they contend that the removal of a prisoner to administrative detention because he is suspected of a crime is an accusation for the purpose of entitling him to appointed counsel provided at government expense. The government of course disagrees.

Administrative detention is imposed primarily in two situations. The first involves internal prison disciplinary proceedings. An inmate suspected of committing a crime in a Federal Correctional Institution first faces disciplinary action by prison officials. Virtually any state or federal crime is also a violation of prison regulations. *See* 28 C.F.R. § 541.11 (1982). And an inmate who is adjudged guilty of breaching prison regulations is subject to disciplinary penalties that range from temporary loss of privileges, or loss of built up "good time," to isolation in disciplinary segregation for up to sixty days.

It is well established that prison disciplinary proceedings are not "criminal prosecutions" as that term is used in the Sixth Amendment. *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Inmates suspected of breaking prison rules must be given a hearing before the Institutional Disciplinary Committee but the full panoply of rights due a defendant in a criminal trial does not apply in disciplinary hearings. *Wolff v. McDonnell*, 418 U.S. at 556. Specifically, an inmate has no right to have retained or appointed counsel present at a disciplinary hearing. *Id.* at 570. Likewise, there is no right to counsel by reason of prehearing detention or detention imposed as a disciplinary measure.

Besides its disciplinary function isolation is imposed when necessary for security purposes. Prison regulations authorize the Warden to order temporary isolation in certain specified situations when an inmate's continued presence in the general prison population poses a serious threat to safety, security, or order. *See* 28 C.F.R. § 541.20 (1982). It is perhaps the principle remedy available to prison officials when crime or other disturbances threaten the prison environment.

Importantly, appellants do not contend that temporary isolation carries with it a right to appointed counsel when the detention is imposed for security reasons. Nor could they. Prison officials are charged with maintaining order and ensuring the safety of inmates and prison employees. Serious crimes compound the difficulty of this responsibility in what is necessarily a volatile environment. Temporary isolation, imposed to defuse a potentially explosive confrontation and to protect inmates from harm, is part

of the correctional process. It is unrelated to any subsequent criminal prosecution.

Administrative detention at times serves an accusatory function, however. The Warden can isolate inmates "pending investigation or trial for a criminal act." 28 C.F.R. § 451.20(a)(3) (1982). In this situation detention is related to a subsequent prosecution. It furthers many of the same governmental interests served by an arrest outside the prison walls. The Supreme Court has recently recognized that confining inmates to administrative detention pending completion of the investigation of disciplinary charges serves the important need of investigative officers to protect witnesses and evidence, to facilitate an effective investigation, and to prevent further criminal activity by the suspect. *Hewitt v. Helms*, 103 S. Ct. 864 (1983). These interests are important for nonprison crimes and in that situation they lead to an arrest at the earliest possible point. But they are important also for serious prison crimes where the insular character of the inmate population creates unique investigatory and evidentiary hurdles for the prosecution and leaves potential witnesses particularly vulnerable to retribution and coercion. The critical fact is that for prison crimes the governmental interests that dictate the isolation of suspects do not lead to an arrest, nor prompt the early initiation of formal judicial proceedings, but rather cause the isolation of suspected inmates in administrative detention for what can be an indeterminate period.

The characterization of administrative detention pending trial as an "accusation" is buttressed when we consider the effect of isolation on the inmate's ability to defend the criminal charges. We note first that an inmate suspected of crime must overcome investigatory obstacles even greater than those facing

the prosecution. The transient nature of the federal prison population makes difficult even the identification of potential witnesses. Combined with a hesitation on the part of potential inmate witnesses to cooperate this imposes a serious impediment to the preparation of an inmate's defense.

Thus early access to the general prison population is critical to the suspect's ability to prepare and preserve a defense. Yet during the time that appellants were in ADU only the government was free to conduct an investigation, contact witnesses, and preserve evidence. Isolated in solitary confinement appellants were unable to confer with potential defense witnesses, or even to keep track of their whereabouts. *Cf. Smith v. Hooey*, 393 U.S. 374, 378-83 (1969) (speedy trial right protects prisoners who are subject to criminal prosecution in another jurisdiction). Appellants were powerless to exert their own efforts to mitigate the erosive effects of the passage of time.

The effect of administrative detention in cases such as these is to deny an inmate the opportunity to take steps to preserve his or her own defense. This distinguishes appellants from suspects outside of prison who have not yet been arrested or indicted. The position of appellants while being held in administrative detention pending investigation of their crimes more resembles that of a suspect outside of prison who has been arrested and detained than that of an outside suspect who has been neither arrested nor detained. Unconvicted suspects confined within prison walls suffer a serious disability.

The government correctly points out that outside of prison it is not an arrest that triggers the right to counsel but rather the initiation of adversary judicial proceedings. *Kirby v. Illinois*, 406 U.S. at 689; *United States v. Coades*, 468 F.2d 1061 (3d Cir. 1972). This fact merely illustrates the need for a

rule designed for prison crimes, however. Upon arrest a defendant must be arraigned "without unnecessary delay." Fed. R. Crim. P. 5(a). At that point the accused is guaranteed the assistance of counsel. No such procedural guarantees operate in prison, where the suspect may be isolated throughout the pendency of the government's investigation.

The Supreme Court long ago recognized the importance of counsel during the "critical period of the proceedings . . . when consultation, thoroughgoing investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). In *Powell*, the deprivation occurred during the one day that passed between the defendant's arraignment and his trial. In the instant case, by contrast, the government was able to delay appellants' arraignments for up to twenty months, thereby effectively suspending the right to counsel until its case was built. This comparison serves to illustrate that an inmate who is suspected of a prison crime is in a unique position viz-a-viz the prosecution. Formal charges need not be brought until the government is ready for trial because the suspect can be isolated without being arrested. To insist that an inmate is not "accused" until formal charges are initiated is to ignore reality.

The government, nonetheless, denies that isolation pending trial can ever be an accusation. First, it cites a line of circuit cases which holds that administrative detention is not an arrest for purposes of the Sixth Amendment speedy trial right. Second, it emphasizes the administrative barriers that exist between prison administrators and the prosecutorial arm of the federal government, arguing that detention is entirely within the province of prison officials. We find neither argument to be persuasive.

This court has held that administrative detention is not an "arrest" for speedy trial purposes. *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *accord*, *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979); *United States v. Duke*, 527 F.2d 386 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976). In *Clardy* we based our decision on the conclusion that administrative detention does not implicate the major evils identified in *United States v. Marion* as those protected against by the speedy trial guarantee. 540 F.2d at 441. The evil that *Marion* attributed to an arrest was that it seriously interferes with defendant's liberty and therefore "may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." 404 U.S. at 320. We held in *Clardy* only that administrative detention does not cause these consequences to the extent that an arrest does and therefore an inmate's detention does not start the speedy trial clock.

We do not question today that *Clardy* was correctly decided. It is simply inapposite to the question before us. Unlike the speedy trial right the assistance of counsel is constitutionally guaranteed not to minimize pretrial interference with defendant's liberty but because of the belief that without it, there can be no assurance that defendant will receive a fair trial. "The plain wording of . . . [the assistance of counsel guarantee] encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *United States v. Wade*, 388 U.S. at 225.

The government also asserts that administrative detention cannot be accusatory because prison officials act on their own accord, and not as an arm of the prosecution, when inmates are placed in adminis-

trative detention. We need not inquire into the extent of cooperation between prison officials, the FBI, and the United States Attorney, however, because the relationship is of little consequence. Administrative detention is a "public act." *See United States v. Marion*, 404 U.S. at 320. When detention is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory. It is not which arm of government orders detention but for what purpose and to what effect.

It is, therefore, clear that the administrative detention of an indigent inmate who is suspected of a crime does, under certain circumstances, give rise to the right to appointed counsel. The question is what are those circumstances. In prison there is no automatic device that triggers the right. It should not arise immediately when detention begins because there are substantial administrative and disciplinary concerns that justify detention but are unrelated to a criminal prosecution. And, as already pointed out, it should not be automatically postponed until indictment. The duty to appoint counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. at 71. By necessity then we must fashion a rule which preserves the right to effective assistance of counsel without impairing the authority of prison officials to carry out their administrative responsibilities.

III.

APPELLANTS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL

Therefore, we must determine, first, at what point administrative detention gives an indigent federal inmate a right to appointed counsel and, second, whether appellants were held beyond that point. Inasmuch as the detention of an inmate suspect serves a variety of goals the reasons for placing an inmate in detention will vary depending on the circumstances. Indeed, appellants no doubt were detained for a number of legitimate reasons.

However, prison regulations specify that administrative detention is "to be used only for a short period of time except where an inmate needs long-term protection." 28 C.F.R. § 541.20(c) (1982). Even when imposed for an inmate's protection, detention is limited to ninety days in all but the rarest of circumstances. *Id.* § 541.21(c). Therefore, the longer an inmate is isolated following the commission of a crime the more the detention takes the form of an "accusation" and the less it resembles either detention for protection of the inmate or for other purposes.

Likewise, the longer the inmate is held the greater the need for counsel. That is because the right to counsel is primarily a trial right. It does not attach until necessary to assure that the accused will receive effective assistance of counsel at the trial itself. *United States v. Wade*, 388 U.S. at 225-27. Counsel can effectively ameliorate the adverse consequences of detention so long as the appointment comes within a reasonable time following the institution of admin-

istrative detention. This is the principle upon which we base our holding. Guided by it we hold that a prisoner, who is being held in isolation because of an impending investigation and indictment related to a serious crime, must be provided counsel, subject to the same conditions as are applicable to an indigent following indictment, after a reasonable time. If counsel is not so provided he must be released into the general prison population.

Current prison regulations provide a standard against which to measure a "reasonable time." The maximum stay in isolation for purposes of discipline even for serious crimes is ninety days. This period consists of thirty days pending a disciplinary hearing and sixty days of disciplinary segregation which does not exceed this length even for serious crimes. 28 C.F.R. § 541.11 (1982).

Isolation for more than ninety days, then, is necessarily for some purpose other than discipline. If an inmate is held after the maximum disciplinary period has expired he should be allowed to show that his detention, at least in part, is due to a pending investigation or trial for a criminal act. The inmate must ask for an attorney, establish indigency, and make a prima facie showing that one of the reasons for continued detention is the investigation of a felony. At that point prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population.

The Supreme Court's decision in *Hewitt v. Helms*, *supra*, is compatible with this structure. That case holds that the state created a liberty interest, protected by the due process clause, by promulgating mandatory regulations that establish specific substantive predicates to administrative detention. 103 S.

Ct. at 871. Since regulations mandate that detention can be ordered only in specific circumstances, then the inmate has a concurrent due process right to ensure that the mandatory requisites in fact exist. Our case, while not governed by *Hewitt*, also utilizes regulations to provide specificity to a constitutional right. Federal prison regulations specify that administrative detention can only continue indefinitely where the detention is in contemplation of a criminal prosecution. In this way the prison regulations create a condition of confinement that embodies an accusation which generates a Sixth Amendment right to the assistance of counsel.

This structure achieves a proper balance of the interests of both prison officials and inmates suspected of crime. It does not require the government immediately to appoint counsel at the earliest stages of an investigation, before the adverse positions of government and inmate have solidified. *See Kirby v. Illinois*, 406 U.S. at 689. Nor does it involve counsel in disciplinary proceedings, thus reducing their utility as a means to further correctional goals. *See Wolff v. McDonnell*, 418 U.S. at 570. And it assures inmates who are suspected of crime, and who are ultimately prosecuted for that crime, that they will not be denied the effective assistance of counsel because of indigency. In this manner, equality with non-indigent inmates is preserved.

The rule also has the advantage of certainty. Whether an inmate is detained past ninety days in part as a pre-trial detainee can be determined from objective criteria. Prison regulations require the Warden to "prepare a memorandum detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate." 28

C.F.R. § 541.20(b) (1982). Moreover, the existence of an ongoing FBI investigation or a United States Attorney prosecutive file provides ample evidence that prosecution is pending. Once an inmate requests the assistance of an attorney and makes the necessary prima facie showing, the government bears the burden of establishing that prosecution is not a significant possibility. If unable or unwilling to make this showing the inmate must either be furnished counsel or be returned to the general prison population.

Turning finally to the facts of the instant case we find that appellants were denied their constitutional right to assistance of counsel. Each appellant remained in administrative detention long past the ninety days which we have held to constitute a reasonable period of administrative detention without counsel. The record shows numerous instances where one or more of appellants requested and was denied the assistance of counsel. And, lastly, the record compels the conclusion that each appellant was held in ADU at least in part as a result of pending criminal charges. The district court in the *Mills* case found that pre-trial detention was the *only* reason for the Mills' defendants prolonged stay in ADU. And the record shows that the *Gouveia* defendants were subject to a continuing FBI investigation throughout their stay in detention. Since appellants were held in detention for more than ninety days and one of the reasons for detention was to isolate appellants pending a criminal investigation and trial, they should have been appointed counsel.

IV.

THE PROPER REMEDY IS TO DISMISS THE INDICTMENTS

In fashioning an appropriate remedy for appellants we are guided by the Supreme Court's recent decision in *United States v. Morrison*, 449 U.S. at 361, 364 (1981). There the Court stated that the remedy for Sixth Amendment deprivations "should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interest." *Id.* at 364. The correct approach is to identify the taint and devise a remedy that neutralizes the prejudice suffered so that the defendant is assured the effective assistance of counsel and a fair trial. *Id.* at 365.

The "taint" in the present case is that lengthy pre-indictment isolation without the assistance of counsel handicapped appellants' ability to defend themselves at trial. Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants.

The district court in dismissing the indictments against appellants Mills and Pierce accurately characterized the prejudice suffered.

> Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison "nicknames" now long-since transferred to other institutions or released from

> custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to rebut the evidence against them.

Mills' Excerpt of Record at 188. As the Supreme Court has put it, we must be "responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective." *United States v. Morrison*, 449 U.S. at 364. The district court was correct when it held that due to the belated appointment of counsel, ranging from 8 to 20 months after the murders were committed, and the transitory nature of the prison population, the opportunity for counsel to prepare the defense that is constitutionally guaranteed all persons accused of crime did not exist.

This case then is qualitatively different from the right to counsel cases in which the question is the right to counsel's presence at a pretrial confrontation between government and accused. When, for example, the government subjects a suspect to a custodial interrogation or a post-indictment lineup without the presence of counsel the prejudice suffered is both specific and curable. Suppression of the confession or evidence that is obtained or derived from the prohibited confrontation protects the right. *E.g., United States v. Wade*, 388 U.S. 218 (1967); *Cahill v. Rushen*, 678 F.2d 791 (9th Cir. 1982). Here, however, government conduct has rendered counsel's assistance to appellants ineffective and the resulting harm is not capable of after the fact remedy. With respect to remedies appellants are in a position similar to suspects who are denied a speedy trial. *See Strunk v. United States*, 412 U.S. 434, 439 (1973); *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Here, as there, the only certain remedy is to dismiss the indictments against them.

The government strenuously argues that appellants must demonstrate that they were prejudiced and that they have failed to present convincing evidence of specific prejudice. Even if this were true, it should not be dispositive. We, of course, do require definite, nonspeculative proof of actual prejudice before finding a due process violation from preindictment delay. *See United States v. Stone*, 633 F.2d 1272, 1274 (9th Cir. 1979); *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1979). The situation in these cases, however, is fundamentally different. Those accused in these cases were not free men as are usually those who complain about preindictment delay. They were not even a part of the general population of the prison. They were isolated in administrative detention. Under these circumstances we presume prejudice because ordinarily it will be impossible adequately either to prove or refute its existence. We must tip the scales in favor of the locked away accused in order to provide substance to the Sixth Amendment right to counsel. Dismissal of the indictments is appropriate where denial of assistance of counsel creates the potential of substantial prejudice. *See United States v. Morrison*, 449 U.S. at 365; *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

Even without the presumption there is evidence that "substantial prejudice" may have occurred in the instant case. Each appellant asserts the loss of critical alibi witnesses either by their death, or by the transfer or release of witnesses known to appellants only by their nicknames. Moreover, it is significant that the government is unable to rebut convincingly appellants' showing of potential prejudice.

In essence the government argues that since appellants were able to produce a large number of "alibi" witnesses then no prejudice could have occurred. This contention is flawed for at least two reasons. First, it assumes that the quantity of witnesses always can overcome the absence of any particular defense witness. This is not true. Second, it ignores other prejudicial factors such as the dimming memories of witnesses whose testimony the defense had no opportunity to record at a time when events were fresh and the deterioration of physical evidence.

We do not preclude the possibility that under circumstances not presently foreseeable the government will be able to rebut convincingly the presumption of prejudice. But it has not done so here. The record convinces us that preindictment isolation without the assistance of counsel unconstitutionally obstructed the ability of appellants to defend themselves at trial. Thus we must overturn the convictions entered against each appellant.

Accordingly, we reverse the judgments of the courts below and remand with instructions to dismiss the indictments.

REVERSED AND REMANDED.

Nos. 81-1271/1272/1273/1274

UNITED STATES

v.

GOUVEIA, et al.

Nos. 81-1206/1278

UNITED STATES

v.

MILLS, et al.

[Filed Apr. 26, 1983]

WRIGHT, Circuit Judge, dissenting, joined by Judges CHOY, KENNEDY, ANDERSON and POOLE

I respectfully dissent. Although I adhere to my position in *United States v. Mills*, 641 F.2d 785 (9th Cir. 1981), the majority's unprecedented expansion of the right to counsel requires that I comment further.

The Supreme Court has spoken with a clear and consistent voice regarding the point at which the right to counsel attaches. It attaches when adversary judicial criminal proceedings are initiated. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). By contrast, the speedy trial right may attach at other times, depending on threats to the liberty interests it protects. *United States v. Marion*, 404 U.S. 307, 320-321 (1971).

The majority today has confused these distinct Sixth Amendment guarantees. Relying on a *de facto* accusation concept derived from *Marion*, it rules that a prisoner stands accused if he is subjected to prolonged administrative detention pending investigation

of a prison crime. Although *Marion* concerned the speedy trial right, the majority concludes that the right to counsel attaches when an inmate is so detained, though formal proceedings have not begun.

The reasons for the majority's intertwining of these different Sixth Amendment rights are obvious. In *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976), we ruled that administrative detention did not bear the characteristics of a *de facto* arrest outside prison walls, and we refused to extend the speedy trial right to prisoners detained pending investigation of prison crimes.

Because *Clardy* forecloses a ruling that the speedy trial right applies to appellants, the majority has focused instead on the right to counsel. It insists that the assistance of counsel is necessary to combat the unique investigatory disadvantages faced by those in administrative detention. It points out that these appellants were powerless to interview witnesses or otherwise combat the "corrosive effects" of the passage of time while the government investigated.

The majority's focus on appellants' inability to interview witnesses underscores its misperception of the role played by the right to counsel. In *United States v. Ash*, 413 U.S. 300 (1973), the Court noted the historic expansion of the right to counsel. It ruled, however, that the right applied to trial-like confrontations and not to the prosecutor's investigations or interviews with witnesses. *Id.* at 312-320.

As the Court noted in *Kirby*, the right to counsel protects the defendant once he faces the prosecutorial forces of society and becomes immersed in the intricacies of the law. 406 U.S. at 689. Appellants may have suffered restrictions on their liberties and may

have been isolated from the government's investigations. Until indicted, however, they faced no confrontations for which the right to counsel was designed.

Just as the majority's interpretation of the right to counsel does not conform to precedent, its emphasis on the appellants' investigatory disadvantages does not conform to reality. I can readily envision situations in which suspects face similar obstacles. One convicted and imprisoned for a single crime may be under continuing investigation for other offenses. Another may have probation or parole revoked for renewed criminal activity. The government may incarcerate these suspects while it investigates criminal activities outside prison, for which they have not been arraigned or indicted. They are equally as "powerless" as appellants to interview witnesses or otherwise mitigate the effects of the passage of time.

Even free suspects often lack the investigatory advantages the majority attributes to them. Many law enforcement investigations are confidential and continue for months or years. Like appellants, the targets in such cases have limited knowledge or none about the investigations.

In any of these situations, indigent suspects might benefit from the assistance of counsel before indictment. As the Court noted in *Ash*, abuse or subversion of an investigation may occur at any point, but the extraordinary safeguard of the right to counsel is unnecessary to protect against such abuse. Suspects are amply protected by the "ethical responsibility" of the prosecutor and due process standards. *United States v. Ash*, 413 U.S. at 320-321.

The Court's rulings on administrative detention cannot buttress the majority's departure from the accepted view of the right to counsel. Although the ma-

Any presumption of prejudice is unwarranted and conflicts with the Court's holding in *Morrison*. The Court there noted that even the total denial of counsel might not warrant the presumption of prejudice and the drastic remedy of indictment dismissal. *Id.* at 364-365.

The appellants here were afforded defenses of uncommon quality and vigor. The *Gouveia* appellants alone presented 14 *alibi* witnesses. The majority's presumption of prejudice neglects the Court's teaching that the courts will dismiss indictments in response to claims that government conduct has rendered the assistance of counsel ineffective only if there is "demonstrable prejudice, or substantial threat thereof." *Id.* at 364-365.

The majority then declares that the appellants have proved prejudice. To show the effects of detention on appellants' defenses, the majority notes the absence of witnesses, dimming of memories, and deterioration of physical evidence.

These are factors commonly noted by those who complain of pre-indictment delay. They result from the passage of time rather than from ineffective advocacy. The applicable statutes of limitations and the Due Process Clause protect accused persons from the effects of any delay. *Marion*, 404 U.S. at 322-325.

To the extent that appellants argue that the government interfered actively with their access to witnesses, they have adequate remedies without resorting to the right to counsel. On a showing that the government has deliberately procured the absence of a material witness favorable to the defense, the indictment can be dismissed. *United States v. Valenzuela-Bernal*, 103 S. Ct. 34 (1982). On a showing that a witness peculiarly within the government's control

jority suggests that prosecutorial confrontations began at appellants' prison disciplinary hearings, the Court has ruled that such hearings do not implicate the right to counsel. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974).

The majority's reliance on the Court's recent decision in *Hewitt v. Helms*, 103 S. Ct. 864 (1983), is misplaced. There the Court recognized that strong governmental interests supported the isolation of suspects in prison crimes. It pointed out that the decision to isolate suspects was peculiarly within the expertise of prison officials and might be necessary to protect witnesses during the investigations. *Id.* at 872-873. Although the Court ruled that state regulations could create a *liberty* interest in remaining in the general prison population, it decided that prisoners did not need the right to counsel to protect that interest. *Id.* at 871, 874.

Hewitt reaffirmed the notion that lawful incarceration of criminals is likely to restrict rather than expand their constitutional liberties. By its decision today, the majority has given suspects in prison crimes a right to counsel during government investigations, a right not available to suspects outside of prison. Rather than limiting the rights of prisoners, the majority has expanded them.

The inconsistencies in the majority's position are revealed further by its presumption of prejudice to appellants. The right to counsel is meant to ensure fairness in the adversary criminal process. *United States v. Morrison*, 449 U.S. 361, 364 (1981). Even if we assume that appellants were improperly denied counsel at an earlier stage, we must ask: were they given a fair trial?

Rather than focus on this question, the majority presumes prejudice and dismisses the indictments.

has not been produced, the defendants may request a missing witness instruction. If given, the instruction allows the inference that the witness would have testified unfavorably to the prosecution. *See United States v. Bramble*, 680 F.2d 590 (9th Cir. 1982).

Finally, the likelihood of exonerating testimony from absent witnesses is preeminently a factual matter for the jury's determination if the defendant chooses to advance the theory as part of his defense. Such contentions are legitimate parts of the defense case that guilt has not been proven beyond a reasonable doubt. All such defenses are fully adequate to meet the arguments presented by the appellants here without straining to grant relief by a new application of the right to counsel under the Sixth Amendment.

Appellants suffered no prejudice from the absence of counsel. By creating a right to counsel here, the majority has departed substantially from Supreme Court precedent. That departure compels me to suggest that review by that Court is indicated.

I would affirm the judgments.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 80-1540

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ROBERT EUGENE MILLS and
RICHARD RAYMOND PIERCE, DEFENDANTS-APPELLEES

Argued and Submitted Feb. 5, 1981

Decided April 6, 1981

Rehearing and Rehearing En Banc
Denied June 25, 1981

As Amended July 7, 1981

Appeals from United States District Court
for the Central District of California

Before WRIGHT and NELSON, Circuit Judges, and EAST, Senior United States District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

On the government's appeal, two issues are presented: (1) was it error to dismiss two murder indictments for Fifth and Sixth Amendment violations, and (2) if so, should we direct the district court to vacate its order which compelled the government to produce statements of witnesses which it would not call at trial? We conclude: the dismissal of the in-

* Of the District of Oregon.

dictments is reversed and the district court is directed to vacate the discovery order.

I. FACTS

At oral argument we were told that inmates at the Federal Corrections Institution at Lompoc, California, committed at least 14 homicides in 1980. Thomas Hall, an inmate, was stabbed to death on August 22, 1979 and the appellees, Mills and Pierce, were believed to be implicated. Along with other inmates, they were questioned and given physical examinations by prison officials and FBI personnel.

On August 23, 1979, prison officials committed Mills and Pierce to the Administrative Detention Unit (ADU). Normal prison policy would have had them returned to the general inmate population or transferred to another institution within a few months. This was not done and they remained in segregation until they were arraigned on April 21, 1980.

During the eight months Mills and Pierce were in ADU, their activities were curtailed. They were not permitted to communicate with inmates not confined in ADU or potential non-inmate witnesses, to discuss their case with anyone other than prison officials, or to be examined by their own physicians or experts. Mills and Pierce had opportunities for exercise, education, and employment, albeit at a reduced level.

In the course of disciplinary hearings conducted by the Bureau of Prisons in the first few weeks after Hall's death, Mills and Pierce said they wished to consult with an attorney. This was denied.

The government indicted Mills and Pierce for murder on March 27, 1980. Trial was originally set for

June 30, 1980, but was continued to July 29, 1980 at Mills' and Pierce's request.

The trial court dismissed the indictments. It concluded the government failed to justify its delay in seeking the indictments or in bringing defendants to trial, or to explain why Mills and Pierce remained in isolation for eight months without assistance of counsel. It found that they had been irreparably prejudiced because of the dimming of memories of exonerating witnesses, the loss of witnesses and the deterioration of physical evidence.

II. DISCUSSION

A. *Sixth Amendment Right to a Speedy Trial*

We review the dismissal of an indictment for violation of the Sixth Amendment right to a speedy trial for abuse of discretion. *See United States v. Simmons*, 536 F.2d 827, 832 (9th Cir.), *cert. denied*, 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130 (1976).

The Sixth Amendment speedy trial provision applies when a defendant is "accused." *United States v. Lovasco*, 431 U.S. 783, 788-89, 97 S.Ct. 2044, 2047-48, 52 L.Ed. 752 (1977); *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468 (1971). That occurs with the filing of either a formal indictment or information "or else the actual restraints imposed by arrest or holding to answer a criminal charge . . . ." *Marion*, *supra*, 404 U.S. at 320, 92 S.Ct. at 463.

The trial court held Mills' and Pierce's Sixth Amendment rights were violated by the ten month delay between their detention in the ADU and the trial date. We disagree.

Administrative segregation by the prison board is not an "arrest" or "accusal" for speedy trial purposes. *United Statesv. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979); *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963, 97 S.Ct. 391, 50 L.Ed.2d 331 (1976). In *Clardy*, this court held the identifying indicia of an arrest are absent in the prison setting.

> The prison discipline did not focus public obloquy upon appellants, did not disrupt their "employment" or drain appellants' financial resources. In short, it was not a public act with public ramifications, but a private act. Actual physical restraint may have increased and free association diminished, but unless we were to say that imprisonment *ipso facto* is a continuing arrest, these criteria bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception.

Id.

In *Clardy*, two inmates were confined in segregation after the stabbing of an inmate. *Id.* They were indicted and arraigned five months later, and their trial commenced seven months after segregation. *Id.* The court rejected their argument that such discipline was an "arrest" for speedy trial purposes. *Id.*

We find nothing in the present case that warrants a different result. The detention in the ADU was at the request of the Bureau of Prisons. The detention orders stated that Mills and Pierce were awaiting investigation of a violation of institutional regulations and investigation or trial for a criminal act, and that their continued presence in the general prison population "pose[d] a serious threat to life, property, self,

staff, other inmates, or to the security of the institution." There was no arrest or accusation until the grand jury indicted them on March 27, 1980. We agree with the Fifth Circuit that the *ad hoc* balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) does not apply. *Blevins, supra.*

B. *Sixth Amendment Right to Counsel*

The trial court also dismissed the indictment on the ground that Mills and Pierce were deprived of the Sixth Amendment right to counsel during the pre-indictment period.

The right to counsel attaches once adversary proceedings have commenced against a person. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d at 246 (1964); *United States v. Bagley*, 641 F.2d 1235 at 1238 (9th Cir. 1981). Initiation of adversary proceedings occurs by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972). Therefore, unless a defendant is an "accused," the right to counsel is inapplicable. *United States v. Zazzara*, 626 F.2d 135, 138 (9th Cir. 1980).

Mills and Pierce were not arrested or accused until indicted in March 1980. Their Sixth Amendment claim to counsel during the pre-indictment period fails.

C. *Right to Prepare a Defense*

Mills and Pierce further support the dismissal of the indictment on the ground that the government denied their right to prepare a defense during the pre-indictment period.

We agree that the ability of an accused to prepare his defense is a fundamental aspect of our adversary system, *see Kinney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970), but do not find that there was a deprivation here. This right, like the right to counsel, belongs to an *accused*. Mills and Pierce were not accused until indicted. They were then given the assistance of counsel and prepared their defense.

D. *Pre-Indictment Delay*

Seven months elapsed from the time Mills and Pierce were placed in the ADU until their indictment. The trial court found this pre-indictment delay deprived them of due process.

Pre-indictment delay may result in a denial in due process. *Lovasco, supra*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752, *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980). To block a prosecution on this basis, a defendant must initially show actual prejudice resulting from the delay. *Swacker, supra; United States v. Stone*, 633 F.2d 1272, 1274 (9th Cir. 1979). The proof must be definite, not speculative. *Swacker, supra; United States v. Tousant*, 619 F.2d 810, 814 (9th Cir. 1980).

Prejudice is a necessary but not sufficient element of a due process claim.[1] *Lovasco, supra; United*

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[1] This required showing of prejudice is the most crucial difference between the Sixth Amendment and the Due Process tests. The Supreme Court has held that an affirmative demonstration of prejudice is not necessary to prove a denial of the constitutional right to a speedy trial, but is only one of the factors to be considered. (citations omitted).

United States v. *Henry*, 615 F.2d 1223, 1232 n.12 (9th Cir. 1980).

States v. Henry, 615 F.2d 1223, 1232 (9th Cir. 1980). Once it is shown, the court must consider the reasons for and the length of the delay. *Swacker, supra*, 628 F.2d at 1254 n.4.

The trial court found Mills and Pierce were prejudiced by the dimming of memories of witnesses who allegedly could have supported their alibi, by the loss of witnesses known only by prison nicknames and now transferred to other facilities or released, and by the deterioration of physical evidence. It also concluded the delay was unreasonably long and unjustified since the government substantially concluded its investigation by October 1979.

Showing that witnesses have been lost or that evidence has become unavailable due to the delay suggests actual prejudice. *Tousant, supra*. But it is not enough to assert that potential witnesses have been lost. A defendant must identify the witnesses, relate the substance of their testimony, and efforts made to locate them. *Id.*

Mills and Pierce allege that identifying potential witnesses by prison nicknames, asserting that they have been unable to locate them, and that the witnesses' testimony would exonerate them is a sufficient showing. We disagree.

Prison nicknames do not erase the element of speculation. There was no showing that these nicknames were recorded and actual identities or the existence of the witnesses could not be associated with any certainty.

Even assuming nicknames are sufficient identification, the substance of the witnesses' testimony is no more than mere speculation. Mills alleges they would support his alibi that he was in the mess hall at the time of the murder. Pierce indicated they "might"

have information that would be of assistance in formulating a defense.

There is no evidence to support Mills' contentions other than his self-serving affidavit. The lack of the actual content of the witnesses' testimony prevents accurate evaluation of its benefit or detriment to him. *See United States v. Mays*, 549 F.2d 670, 679-80 (9th Cir. 1977).

> As it stands now, a trier of fact might as well assume that the [witnesses] would have placed *all* of the blame on the defendants, as to assume that they would have *exonerated* them.

Id. at 680 (emphasis in original).

Pierce's claim that the missing witnesses might have been useful does not show actual prejudice. *United States v. West*, 607 F.2d 300, 304 (9th Cir. 1979).

Nor does the claim that the witnesses' memories have dimmed without proof of impairment constitute actual prejudice. *United States v. Rogers*, 639 F.2d 438 (8th Cir. 1981); *Mays, supra.*

Mills and Pierce also argue they were prejudiced by the destruction of evidence. They claim useful documents were discarded routinely or lost by the government. Blood stains on clothes taken from Mills could not be typed to prove their origin. Finger impressions on Pierce's arm and a wound on Mills' arm had healed.

There is no evidence about the deterioration rate of the blood stains, when Mills' and Pierce's wounds healed, or when the documents were destroyed or lost. They could have become unavailable for defendants' purposes even if the government had indicted defendants one month after the murder. Consequently, it cannot be said that the unavailability of this evidence

was related to a pre-indictment delay. *See United States v. Walker*, 601 F.2d 1051, 1057 (9th Cir. 1979).

We also note that this is not the appropriate time to determine whether the government had any obligation to preserve certain evidence. *Id.*

We find that there was insufficient evidence to establish actual prejudice. The district court abused its discretion in dismissing the indictment. It is unnecessary to consider the length of or the reason for the delay.[2] *West, supra*, 607 F.2d at 305.

E. *Discovery*

By petition for writ of mandamus, the government appeals the trial court's order requiring production of

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[2] Our decision would be no different if we consider these factors. Mills and Pierce argue the delay of eight months was inexcusable because the government had interviewed most witnesses and evaluated the tangible evidence by mid-November 1979. However,

> it is not enough to show that the prosecution could have proceeded more rapidly or that there were some months during the period of delay in which no additional investigation was taking place. The prosecution is not expected to account meticulously for each month that is taken in carrying out the appropriate prosecutorial functions.

United States v. Walker, 601 F.2d 1051, 1056 (9th Cir. 1979). There must be some culpable conduct by intentionally or recklessly delaying indictment to gain a tactical advantage. *See United States v. Swacker*, 628 F.2d 1250, 1254 n.5 (9th Cir. 1980); *Walker, supra.*

There was no evidence of intentional government delay. The investigation was ongoing until defendants were indicted.

We also note that eight months is not an inordinate delay. *See, e.g., Walker, supra*, at 1054 (thirteen-month delay); *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977) (four-and-one-half year delay).

statements of inmates the government had interviewed but did not intend to call as witnesses.

The production of witness statements is governed by the Jencks Act. *Palermo v. United States*, 360 U.S. 343, 351, 79 S.Ct. 236, 3 L.Ed.2d 227 (1959); *United States v. Walk*, 533 F.2d 417, 419 (9th Cir. 1975). The Act provides that no statement of a government witness is discoverable until the witness has testified on direct examination. 18 U.S.C. § 3500(a); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979), *cert. denied*, 445 U.S. 966, 100 S.Ct. 1656, 64 L.Ed.2d 242 (1980).

Federal Rule of Criminal Procedure 16(a)(2) excludes from pretrial discovery "statements made by government witnesses or prospective government witnesses, except as provided in 18 U.S.C. § 3500 [Jencks Act]." For the purposes of Rule 16, statements made by persons who were prospective witnesses when interviewed do not lose that character by a subsequent decision not to call them at trial.

Consequently, Mills' and Pierce's contention that the statements are discoverable as documents under Federal Rule of Criminal Procedures 16(a)(1)(C) fails. The trial court exceeded its authority by ordering the production of these statements over the government's objection. *United States v. Percevault*, 490 F.2d 126, 129 (2d Cir. 1974).

Our result is consistent with the policies underlying these discovery rules. Rule 16(a)(1)(A) authorizes broad pretrial discovery of defendant's statements because they are deemed vital to the defense. *Percevault, supra.* But this reasoning is not pertinent to statements made by prospective government witnesses. Protection of their statements is necessary to protect the witnesses from threats, bribery, and perjury. *Walk, supra; Percevault, supra.* The need

to protect those who cooperate with the government is especially compelling here where the witnesses are prison inmates who live in fear of retaliation for providing evidence against fellow inmates. Depriving them of that protection also jeopardizes the likelihood of future cooperation by prison inmates.

The writ is granted.

REVERSED and REMANDED for further proceedings.

NELSON, Circuit Judge, concurring specially:

I concur in the majority opinion. I must add that the facts of this case are unquestionably troubling. The conduct here creates a visceral reaction that this must be some kind of constitutional violation. The trial court's decision is thus understandable, and I regret that the law requires reversal.

Today's result must not be read, however, as suggesting that due process stops at the jailhouse door. The government cannot brazenly disregard prisoners' constitutional rights when preparing a criminal case against an inmate.

It is important to note that the instant appeal involves dismissal of the indictment by the lower court. In my view, defendants' strongest arguments are those alleging that their isolation wrongfully precluded them from engaging in the activities necessary to prepare an effective defense. Such a due process claim goes to the heart of a defendant's constitutionally protected right to defend himself at trial. The defendants' claims would thus be appropriately raised at trial. Our decision today, which reviews only the dismissal of the indictment, does not foreclose defendants from doing so.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CR 80-278-WPG

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT EUGENE MILLS and
RICHARD RAYMOND PIERCE, DEFENDANTS

[Filed Aug. 14, 1980]

ORDER DISMISSING INDICTMENT

The defendants having moved this Court for an order dismissing the indictment against them; and the motion having come on for hearing on July 21, 1980; and the Court having considered fully the memorandum and declarations submitted in support of, and in opposition to, the motion as well as the argument of counsel, the Court rules as follows:

SUMMARY OF RULINGS

1. By virtue of the government's ten-month delay in bringing this matter to trial, defendants were denied their Sixth Amendment right to a speedy trial;

2. By virtue of the government's seven-month delay in bringing this matter to indictment, defendants were denied their Fifth Amendment right to due process; and

3. By virtue of the government's conduct in holding the defendants incommunicado for a period of eight months and in refusing to appoint attorneys for them or otherwise to permit them to interview witnesses and preserve evidence during this period, the defendants were denied their Fifth Amendment right to prepare a defense and their Sixth Amendment right to counsel.

FACTUAL BACKGROUND

The Court's ruling in these regards are based on the following:

1. On the evening of August 22, 1979, Thomas Hall, an inmate of FCI, Lompoc, was murdered. Within hours of the murder, the defendants, who were also inmates, were detained, interrogated and subjected to physical examinations by the FBI and prison authorities. Throughout the interrogation and examinations, the defendants stated that they did not want to be questioned or examined further without being permitted to consult with an attorney. The government consistently denied the defendants' request for counsel, and it continued the interrogation and examination. At one point, the defendants were asked to sign waivers of counsel, which they refused to do.

2. At the conclusion of the interrogation and examination, the defendants' clothing and personal property were confiscated, and the defendants were sent to solitary confinement in "strip cells" located in the basement of the prison's Administrative Detention Unit ("ADU"). As prison records indicate, on the morning following the murder, the defendants were committed to semi-solitary confinement in the ADU

"pending investigation or trial for a criminal act." This characterization of defendants' ADU commitment is not disputed by the government. Although Bureau of Prisons' policy would have required the defendants' release back into the general prison population or their transfer to a more secure facility within the first few months after their ADU commitment, the defendants remained in segregation until they were transferred to the Los Angeles County Jail for their post-indictment arraignments on April 21, 1980.

3. During their first two weeks in solitary confinement in ADU, defendant Mills was reminded by prison employees that he and Pierce were under suspicion for the murder of Thomas Hall, although they were not questioned again about the murder until approximately two weeks after their commitment. At that time, defendants were summoned to a hearing before the Unit Disciplinary Committee ("UDC"), consisting of their counselor and their case managers. During the hearing, the defendants were informed that, based on confidential sources, the government had concluded that they were responsible for the murder of Thomas Hall. As prison records confirm, the defendants again denied involvement in the Hall murder, and renewed their request that counsel be appointed on their behalf. The government again denied their requests for counsel.

4. Shortly after the UDC hearing, on or about September 13, 1979, the defendants were called to a second hearing before the Institutional Disciplinary Committee ("IDC"). Senior officials from the prison administration conducted this hearing, during which the defendants reiterated their innocence and requested the appointment of counsel. The defendants

were told they had no right to an attorney. During his hearing, defendant Mills was encouraged by the hearing officer to "talk to him in private" about the Hall murder, and to disclose the names of inmates who might be favorable witnesses to defendants. Defendant Mills refused, and his request for an attorney or some other neutral (non-prison staff) party to contact such inmates was refused. At the conclusion of the IDC hearing, the defendants were told they were guilty of the Hall murder, and that they were to be sent to the Control Unit of FCI, Marion, Illinois, the federal prison system's highest security facility. Subsequently, defendant Mills was interviewed by a Federal Bureau of Prisons official for potential placement at Marion, and told that the government was preparing an indictment against him for the murder of Thomas Hall. That indictment was returned by the grand jury on March 27, 1980.

5. During the eight months the defendants were held in solitary confinement, they were not permitted to contact other inmates in the prison (except those also confined in ADU), to contact potential non-inmate witnesses, to discuss their case with anyone other than prison officials, or to be examined by their own doctors and experts. Nor were the defendants provided an attorney or other neutral person to assist them in contacting witnesses, preserving evidence or advising them generally with respect to the murder charges for which they were then being detained.

6. The defendants' commitment to ADU in this case resulted in a dramatic change from the conditions under which they previously had lived in prison. Relative to inmates in the general prison population, defendants' freedom of movement was severely curtailed. Their contact with fellow inmates was vir-

tually eliminated, as were their opportunities for recreation, education and employment. In addition, as a result of their commitment to ADU, the defendants understandably concluded that some of the inmates in the general population assumed that the defendants had been placed in ADU for their own safety for having informed on other inmates; and that other inmates concluded that because prison authorities had committed the defendants to ADU, the defendants were in fact responsible for the Hall murder. Consequently, the defendants felt threatened by two groups of inmates, those who would avenge Hall's death and those who would seek to punish the defendants for their apparent violation of the inmate prohibition against informing.

7. Defendants' eight-month isolation in ADU, coupled with the government's refusal to provide them with counsel during the period of their ADU commitment, resulted in acute emotional and mental strains being placed on the defendants. Moreover, the defendants were deprived of even the meager freedom of movement and association and recreational, educational and employment opportunities enjoyed by inmates in the general prison population. Further, isolated in ADU without the assistance of counsel or some other representative, defendants were made to suffer the frustration of being wholly unable to begin preparing a defense to the murder charges they had been informed would be forthcoming.

8. The government has failed to justify its delay in seeking indictments or in bringing the defendants to trial, or to explain why for eight months the defendants remained in isolation without the assistance of counsel while the government acted to tie together its own case against them. By the evening of August

22, 1979, when the defendants were placed in segregation, the finger of suspicion had already pointed toward them. As government counsel conceded during argument, had the defendants been at-large on the evening of the murder, under the circumstances of this case they would have been promptly arrested, taken before a magistrate and provided with counsel.

9. It is manifest that the government could have moved this case to indictment and trial with far greater dispatch than it did. By September 20, 1979, the government had interviewed all of the prison employees on whose testimony it could have relied at trial. With one exception, all of the inmate witnesses' testimony on which the government intended to rely at trial had been obtained through witness interviews which were completed by October 1979. By the end of October 1979, the government had concluded over 131 inmate witness interviews, but it conducted only 16 inmate witness interviews from the beginning of November through the date on which an indictment was sought, March 27, 1980. With respect to tangible evidence, of the 30 items of physical evidence pertaining to this case, the FBI had analyzed 21 of these items by November 15, 1979. Additional analyses were postponed pending receipt of samples of the defendants' hair and blood. Yet, the government declined to request a grand jury subpoena for these samples when the grand jury was first convened in October 1979. Instead, it deferred until after an indictment was returned.

10. Defendants' eight-month detention in ADU, their total segregation from the general prison population and the government's refusal to appoint counsel or some other neutral investigator on their behalf combined to prejudice irreparably the defend-

ants' ability to prepare for trial and to contest the charges against them. Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison "nicknames" now long-since transferred to other institutions or released from custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to rebut the evidence against them. In short, because of their belated appointment, and because of the transitory nature of the prison population, defense counsel simply did not have the opportunity to make the kind of investigation that the government made. The handicaps under which the defense must now operate cannot be remedied at this late date.

LEGAL CONCLUSIONS

Based on the foregoing, the Court holds as follows:

1. For purposes of the Sixth Amendment guarantee of a speedy trial, defendants stood "accused" of the murder of Thomas Hall when on the evening of August 22, 1979, they were committed to ADU. The circumstances of this case differ markedly from those in *United States* v. *Clardy*, 540 F.2d 439 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976), which held that on the facts there *sub judice*, segregation of a prisoner for purposes of imposing prison discipline did not constitute an "accusation." Here, defendants' commitment to ADU was neither a form of prison discipline nor an attempt to ensure prison security. Rather, defendants were detained in ADU "pending investigation or trial for a criminal act." The commitment therefore bears all of the indicia of a criminal arrest

and must be viewed as part and parcel of a sequence of prosecutive acts integrally related to the application of criminal sanctions. Further, on the facts of this case, the consequences of the defendants' commitment to ADU—depriving them of all contact with fellow inmates, stigmatizing them in the eyes of the prison population, subjecting them to the possibility of inmate reprisals, creating in them and their families and friends justifiable anxiety, and precluding them from preparing a defense—are indistinguishable from the constitutionally significant consequences of "arrest" identified by the Supreme Court in *United States* v. *Marion*, 404 U.S. 307, 331 (1971).

2. Because the defendants stood accused of the murder of Thomas Hall for some ten months prior to the date initially set for trial, and because the government has failed to justify its delay in bringing the defendants to trial, the Court finds that defendants were denied their Sixth Amendment right to a speedy trial.

3. Viewing this case as one solely of pre-indictment delay, the Court is persuaded that defendants were denied due process by the government's seven-month delay in seeking an indictment against them. Although by October 1979 the government had substantially completed its investigation and had uncovered virtually all the evidence it intended to use against the defendants, an indictment was not sought for an additional five months. In view of the defendants' segregated confinement and lack of representation while the government conducted its pre-indictment investigation, the government had an obligation to seek an indictment with all deliberate speed. As the defendants have demonstrated with the requisite specificity, the government's failure to discharge this

obligation severely and irreparably prejudiced the defendants' ability to prepare for trial and to contest the charges on the merits.

4. As an independent basis for this order, the Court determines that defendants were deprived of their Sixth Amendment right to counsel. Viewing their ADU detention as an arrest for Sixth Amendment purposes, defendants were entitled to the prompt commencement of adversarial proceedings which would have triggered their right to counsel. However, through the process of "administrative" detention, the government delayed for eight months the commencement of adversarial proceedings and effectively frustrated the defendants' right to counsel. As a result, defendants were denied any effective opportunity to have an investigation conducted on their behalf while events were still recent and recollections intact. When attorneys were appointed eight months later, they were precluded by the passage of time from conducting an investigation anywhere near as thorough as that made by the government.

5. Moreover, even if the Sixth Amendment right to counsel is not viewed as attaching at or near the time of defendants' commitment to ADU, the Court is persuaded that defendants nonetheless enjoyed a right under the due process clause of the Fifth Amendment to prepare a defense. Under the circumstances of this case, that right, too, was denied them. For a period of eight months, defendants remained substantially incommunicado, isolated from potential witnesses, precluded from preserving favorable testimony and evidence, and unable to prepare a rebuttal to the evidence against them. To the extent that the government was not obligated to appoint counsel on their behalf prior to their arraignment, and chose

not to honor the defendants' requests for counsel at an earlier date, the goverment was obligated to relax the conditions of the defendants' custody so as to provide them with a meaningful opportunity to prepare a defense to the charges that were forthcoming. Because the passage of time has resulted in the irrevocable loss of exculpatory testimony and evidence, the government's failure to take steps to preserve the defendants' right to prepare a defense cannot be remedied other than by dismissing the indictment.

ACCORDINGLY, IT IS HEREBY ORDERED that the indictment is dismissed with prejudice.

DATED: August 14, 1980

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

Presented by:

/s/ Charles P. Diamond
CHARLES P. DIAMOND
Attorney for Defendant Robert E. Mills

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